APPENDIX A

Remittitur (Order of Affirmance) of the Court of Appeals of the State of New York

COURT OF APPEALS

STATE OF NEW YORK, ss.:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 7th day of July in the year of our Lord one thousand nine hundred and sixty-six, before the Judges of said Court.

WITNESS,

THE HON. CHARLES S. DESMOND,
Chief Judge, Presiding.

RAYMOND J. CANNON,
Clerk.

REMITTITUR July 7, 1966

FILED Jul 20 1966

2. No. 223 66

THE PEOPLE &c.,
Respondent,

vs.

CARL I. COHEN,
Appellant.

Appendix A—Remittitur (Order of Affirmance) of the Court of Appeals of the State of New York

BE IT REMEMBERED, That on the 9th day of May in the year of our Lord one thousand nine hundred and sixty-six, Carl I. Cohen, the appellant—in this cause, came here unto the Court of Appeals, by Kleinman, Gold & Landsman, his attorneys, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And The People &c., the respondent—in said cause, afterwards appeared in said Court of Appeals by Aaron E. Koota, District Attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Eugene Gold, of counsel for the appellant—, and by Mr. William I. Siegel, of counsel for the respondent—, and after due deliberation had thereon, did order and adjudge that the order of the Appellat Division of the Supreme Court appealed from herein be and the same hereby is affirmed.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said order be affirmed, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said

Appendix A—Remittitur (Order of Affirmance) of the Court of Appeals of the State of New York

Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

RAYMOND J. CANNON
Clerk of the Court of Appeals
of the State of New York

COURT OF APPEALS, CLERK'S OFFICE,
Albany, July 7, 1966.

[SEAL]

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

RAYMOND J. CANNON
Clerk

APPENDIX B

"Memorandum" Report of Decision of New York Court of Appeals (Including Dissenting Opinion of Chief Judge Desmond and Judge Fuld), 18 N.Y. 2d 650

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. CARL I. COHEN, Appellant.

Argued June 2, 1966; decided July 7, 1966.

Crimes—wiretapping—Supreme Court vacated and set aside order authorizing telephone wiretapping of defendant's office telephone, restrained use at defendant's trial of any conversations obtained as result of wiretapping pursuant to said order and any leads, clues and information obtained as result of use of said wiretapping, restrained use at trial of any articles of evidence seized or examined in search of defendant's home and office and any leads, clues and information obtained as result of use of said articles, and also restrained use at trial of testimony of female persons named in specified indictments—Appellate Division modified, agreeing that evidence seized in search had been properly suppressed, but finding that order authorizing wiretapping had been based on sufficient affidavits —order of Appellate Division affirmed.

People v. *Cohen*, 24 A D 2d 900, affirmed.

APPEAL, by permission of an Associate Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered November 29, 1965, which modified and, as modified, affirmed an order of the Supreme Court (DOMINIC S. RINALDI, J.;

opinion 42 Misc 2d 403), entered in Kings County, which, upon motion by defendant, (1) vacated and set aside an ex parte order issued on July 28, 1960 by a Supreme Court Justice authorizing telephone wiretapping of defendant's office telephone, (2) restrained and precluded the District Attorney of Kings County and all police officers of the City of New York from using upon defendant's trial (a) any and all articles of evidence seized or examined by police officers in defendant's home and office on September 2 and 3, 1960 and any and all leads and clues revealed or any information directly or indirectly obtained as a result of the use of said articles of evidence, (b) any and all telephone conversations obtained as a result of telephone wiretapping of defendant's office telephone pursuant to the ex parte order of July 28, 1960 and any and all leads and clues and any information obtained as a result of the use of said wiretapping and (c) the testimony of the female persons named in five specified indictments, and (3) directed the return to defendant of all the property seized from his person and office on September 2 and 3, 1960 and any and all photographs, copies, notes or memoranda of the articles seized or examined. The modification consisted of deleting the paragraphs which vacated and set aside the ex parte order of July 28, 1960 and which restrained and precluded from use upon defendant's trial the telephone conversations and the leads, clues and information obtained as a result of the wiretapping pursuant to said order and the testimony of the female persons named in the specified indict-

ments. The Appellate Division found that the denial of a prior motion by defendant to vacate the ex parte order of July 28, 1960 (see 41 Misc 2d 158) had not been on the merits and, accordingly, did not bar the present litigation; that the affidavits in support of the People's motion for the order authorizing the wiretapping (see 42 Misc 2d 403, 406) were sufficient, but that the search had been conducted without defendant's consent and without a warrant and had not been incidental to a lawful arrest and that, accordingly, evidence seized during it had properly been suppressed. In the Court of Appeals defendant argued, in part, that the affidavits upon which the order authorizing the wiretapping was issued were insufficient and failed to show "reasonable ground to believe that evidence of crime" might be obtained, as required by section 813-a of the Code of Criminal Procedure; that said section was unconstitutional as applied to the present case; that all evidence obtained or derived directly or indirectly from the wiretapping should be excluded as violative of Federal constitutional and statutory prohibitions, and that the wiretapping was inextricably interwoven with the unconstitutional search of September 2-3, 1960.

Eugene Gold for appellant.

Aaron E. Koota, District Attorney (*William I. Siegel* of counsel), for respondent.

Order affirmed; no opinion.

Appendix B—"Memorandum" Report of Decision of New York Court of Appeals (Including Dissenting Opinion of Chief Judge Desmond and Judge Fuld), 18 N.Y. 2d 650

Concur: Judges VAN VOORHIS, BURKE, SCILEPPI, BERGAN and KEATING. Judge FULD dissents in the following memorandum in which Chief Judge DESMOND concurs: I adhere to the views I expressed in *People* v. *Dinan* (11 N Y 2d 350, 357)—that evidence should be excluded if obtained by interception of telephone communications in contravention of the Federal Communications Act, and, accordingly, vote to reverse and to order a new trial.

APPENDIX C

Opinion of Appellate Division, Second Department, Supreme Court of New York, 24 A.D. 2d 900

In a criminal action, the People appeal from an order of the Supreme Court, Kings County, entered March 13, 1964 after a hearing, which (a) granted defendant's motion to suppress certain evidence allegedly obtained as the result of an unlawful search and seizure and as a result of telephone wire-tapping of the defendant's office telephone pursuant to an *ex parte* order of said court, issued July 28, 1960; (b) vacated said *ex parte* order; and (c) precluded the use at trial of any evidence or leads resulting therefrom. The People have filed the statement required by statute (Code Crim. Pro., § 518-a) in order to perfect the appeal from the said order.

Order modified (1) by amending the first decretal paragraph to provide that defendant's motion be granted only to the extent set forth in the third and sixth decretal paragraphs (as hereafter indicated) and (2) by deleting therefrom the second, fourth and fifth decretal paragraphs. Order, as so modified, affirmed.

The defendant, a physician, was charged in five indictments with nine counts alleging the commission of criminal abortions and with one count charging the crime of attempted abortion. His motion to suppress the fruits of a search of his office and to preclude the use of leads obtained through the use of a wiretap on his office telephone was granted (42 Misc 2d 403) after his prior motion to vacate and set aside the original *ex parte* wiretap order had been denied (41 Misc 2d 158).

Appendix C—Opinion of Appellate Division, Second Department, Supreme Court of New York, 24 A.D. 2d 900

The denial of defendant's motion to vacate and set aside the original order authorizing the wiretap did not reach the question of the validity of said order. The motion was denied on a finding that the moving papers in support of the motion to vacate were insufficient. Since the merits of the order were not reached, the ultimate holding does not bar a relitigation of the matters not specifically passed upon (Eagle Lion Studios v. Loews, 248 F. 2d 438, 444, affd. 358 U.S. 100; Southern Pac. R. Co. v. United States, 168 U.S. 1; St. Joseph Union Depot Co. v. Chicago R.I. & P. Ry. Co. 89 Fed. 648; cert. den. 172 U.S. 649; Schneider v. Schneider, 281 App. Div. 250).

The original wiretap order was a proper subject of judicial review in the same manner and to the limited extent permitted with respect to a warrant for search and seizure

We hold that the affidavits in support of the People's motion for an order authorizing a wiretap were suffiicent.

The finding that defendant did not consent to a search of his office is supported by the evidence. Since there was no warrant and the search was not conducted incidental to a lawful arrest, the evidence seized was properly suppressed.

BELDOCK, *P.J.*, CHRIST, HILL, RABIN and BENJAMIN, *JJ.*, concur.

APPENDIX D

Opinion of Justice Rinaldi, Supreme Court of New York, Kings County, 42 Misc. 2d 403

People, & C. v. Carl I. Cohen—The defendant is a physician who is charged with abortion under indictments returned in November, 1960. He now moves under Code of Criminal Procedure, sections 813-c, et seq., to suppress evidence obtained by telephone wiretapping and by a search of his private office. The defendant's private office telephone was tapped by police officers from July 29 to September 2, 1960, pursuant to an ex parte order issued on July 28, 1960. It is conceded by the People that the information obtained from such wiretaps resulted in the leads which culminated in the defendant's arrest for abortion at his home on the night of September 2-3, 1960. At that time, a search was also made at his home and office. The arrest and search was made without a warrant.

This court conducted an extensive evidentiary hearing on the motion to suppress. There was made available to the court, in camera, the affidavits which were presented in support of the application for the ex parte wiretap order, as well as other information.

There can be no serious dispute that pertinent New York statutes contemplate and authorize a review of wiretap orders. Code of Criminal Procedure, section 813-a, authorizing ex parte wiretap orders, itself contemplates, by its incorporation of the constitutional standard "reasonable ground" (which is equivalent to "probable cause"), and by requiring preservation of the papers, that the matter shall be subject to judicial review when necessary. Code of Criminal Procedure secs. 813-c et seq., re motions

to suppress evidence, must be read in the light of the virtually identical Federal motion procedure after which it is obviously patterned. That Federal procedure, it is settled, includes motions to suppress wiretap evidence. New York's new motion procedure (secs. 813-c et seq.) was adopted with the expressly declared legislative purpose of bringing this state into compliance with Federal constitutional search-and-seizure requirements under the Mapp case (367 U. S. 643).

CPLR, section 4506 (formerly C. P. A. sec. 345[a]), also adopted in an express effort by the legislature to meet Federal standards, make inadmissible in criminal prosecutions evidence and evidentiary leads obtained by illegal wiretapping. Therefore, when, as here, a defendant in a criminal prosecution invokes the new motion to suppress procedure in aid of his rights under the new CPLR section 4506, it is impossible to see how the court can avoid the duty of determining whether a claimedly legal telephone wiretap, assertedly authorized under this State's permissive ex parte wiretap legislation above cited, was in fact legally authorized or not under the statutory standards of said permissive procedure. The court is aware of the contention of the People that a prior proceeding which was commenced before Mr. Justice Arkwright who denied the motion to vacate the wiretap order is now a bar to the instant motion (People v. Cohen, 41 Misc. 2d 158). The court finds that such proceeding does not affect its right to pass upon the validity of the wiretap order. Such prior proceeding did not avail itself of the processes of the Code of Criminal Procedure, section 813-c et seq. and in any event

never reached the merits of the issue as to the validity of such order. Mr. Justice Arkwright in his opinion denying the application before him clearly stated, and this court is in complete agreement, that our courts have the inherent power to reconsider the issuance of a wiretap order if perjury or error be shown in the original supporting affidavits or for any other cogent reason. Since the defendant at that time could only furnish limited information to him, his denial was solely on procedural grounds. The appeal from his order was dismissed by the Appellate Division, Second Department (N. Y. L. J., April 18, 1963, p. 16), and leave to appeal to the Court of Appeals was denied on July 10, 1963, by Fuld, J., and the court en banc (13 N. Y. 2d 595).

That being the case, this court deems itself under a duty to consider the issues raised by this motion on the merits. In order to do so, it must determine whether the "reasonable ground" requirement of the Code of Criminal Procedure, section 813-a, was satisfied in the issuance of the wiretap order.

The order was issued on July 28, 1960, by a former justice of this court on the supporting affidavits of Kenneth J. McCabe, chief assistant of the district attorney, now deceased, Alvin G. Rosen and his "girl friend" Audrey Salzman. These two persons were the subject of an investigation by the district attorney in crimes involving forgery, burglary and arson, none of which concerned the defendant in this case, in which it was claimed they had participated. During the course of such investigation, Rosen, in an obvious attempt to curry favor with the police, volunteered

information that the defendant was conducting an "Abortion Mill." The information which he furnished to the police and which was incorporated into the supporting affidavits was as follows: That Rosen and his "girl friend" had at one time visited the defendant to arrange for her abortion; that they could not agree on price; that they left and did not return because she later discovered that she was not pregnant; that a friend of the "girl friend" had once been aborted by the doctor in July or August of 1958 and subsequently again a year later and also in October or November of 1959. Rosen stated and it was so set forth in the supporting affidavits that he had obtained this information from his "girl friend" who in turn had learned of this from her friend. No supporting affidavit was obtained from the "prolific" friend. Thus supporting affidavits based to a great extent on hearsay twice removed and on events which had transpired a long time prior thereto, became the basis for the issuance of the wiretap order. There is also a serious question as to whether or not the police had previous sufficient other dealings with the informer which would have led them to depend upon the reliability of their information. In any event, the police testified that they proceeded to "tap" the office telephone of the defendant and as leads were obtained, they questioned certain females who were observed leaving his office and obtained statements from them which led to the eventual arrest and indictment of this defendant.

In the light of the foregoing, was there "reasonable ground" to believe that "evidence of crime may thus be

obtained'' in order to comply with the statutory requirement under section 813-a?

It is elementary that there can exist no ''probable cause'' to search for mere ''future'' crimes and case law as to ''probable cause'' is concerned with ''past'' or ''present'' crimes (Brinegar v. United States, 338 U. S. 160). At the most therefore, wiretapping may only be permitted upon a showing which meets the tests of ''probable cause'' that a crime has been or is being committed. Under our law as it is presently constituted, law enforcement officers are on the horns of a dilemma. Wiretapping is a crime under federal statutes but is permissible in our state if made with the sanction of a court order. And yet, if such sanction is obtained and ''taps'' made, the question presents itself whether those officers connected with such wiretapping may not be prosecuted for the violation of a federal statute. Wiretap orders are therefore issued with great reluctance and it has become the common practice to avoid issuance if other means are available to law enforcement agencies to obtain the required results.

The reliability of the informers in order for the issuing court to determine for itself ''reasonable grounds'' or ''probable cause'' becomes of paramount importance. If the police vouch for such reliability facts must be stated and brought to the attention of the court to satisfy it that such is the case. The informers, Alvin Rosen and Audrey Salzman at the time they gave information to the police concerning this defendant were themselves deeply enmeshed in what was apparently a major ring of burglars, arsonists and forgers. It is true that they ''accurately'' confessed

their own misdeeds and those of their accomplices in which they had already been implicated. They, at no time, however, previously informed the police as to crimes in which they themselves were not implicated. On that basis, the police had no criteria to judge their reliability concerning information as to this defendant. Vouching as to their reliability had no basis in fact, "• • • the affiant must • • • demonstrate that the informant has established a reputation for reliability so as to be worthy of belief" (United States v. Ramirez, 279 F. 2d 712, 715, C. A. 2, 1960).

Judge Sobel of this court, in his recent Law Journal articles (October 29, 1963) referred to "the rather strict standards of reliability of informers" citing the leading cases of Draper v. United States (358 U. S. 307), Jones v. United States (362 U. S. 257), Henry v. United States (361 U. S. 98). One of our leading cases, People v. Coffey (12 N. Y. 2d 443), along the same lines specifies that "simple, untested rumor is not ground enough nor • • • is untested information from a person of no established reliabilty, or suspicion alone. Substantiation of information can come either from the informer's own character and reputation or from the separate objective checking of the tale he tells." Although these decisions and a multitude of others in the same vein, involved search and seizure, the same standards, at the least, must be applied to wiretap orders. Both types of order are obtained ex parte. However, execution of the search warrant necessarily reveals its issuance and objectives. The same may not be said of wiretap orders which are carried out surreptitiously except in those rare in-

stances where the object of the wiretap learns of it through accident. It would not be amiss for the court to state that, if at all, the standards to test the advisability of issuing a wiretap order should be much more stringent than those applied to search warrants.

The court cannot find anything in the original wiretap affidavits which meet the foregoing tests as to statutory requirements of "reasonable grounds" and "reputation for reliability." It must therefore conclude that the wiretap order was issued contrary to statutory and settled law and the said order is hereby vacated.

The wiretapping activity from July 29 to September 2, 1962, being thus determined to have been illegal in toto, all evidence and all evidentiary leads obtained or derived from the wiretap, and all evidence obtained or derived from such leads, are hereby ordered suppressed and inadmissible pursuant to CPLR, section 4506. In order that there be no doubt as to this, the court finds, from the testimony at the hearing herein, and from the reasonable inferences based on the aforesaid, that the People obtained from the wiretaps, in the case of each of the females, whose alleged abortions are the subject of the indictments, the original information or leads upon which subsequent charges of abortion, or upon which subsequent investigation in turn leading to charges of abortion, were based.

The court finds further, and in conjunction with the findings above stated, that the People's claim that the original information or leads referred to in said above findings were obtained from surveillance or other police activity not inclusive of wiretapping, is not supported by any evidence

other than purely conclusory assertions of the police witnesses. The latter witnesses not having testified concerning any details or concrete circumstances whatever to support such conclusory claims of surveillance results, &c., and the evidence that the original information or leads came from wiretapping being strong and convincing, this conclusory contention of the People is hereby found not to have been established.

The court further finds that the list of names of females which Policewoman O'Meara brought with her to the defendant's office on the night of September 2-3, 1960, for the purpose of checking said list against defendant's private office records, consisted either of names obtained exclusively in the first instance from the wiretaps, or of names obtained by means so inextricably connected with the wiretaps as to be required to be deemed a product thereof as a matter of law and for the purposes of the instant proceeding. The only inference permitted by the testimony and by the other records of this proceeding is that the aforesaid list of names was in itself in fact either a sole product of the wiretap, or a joint product of the wiretap plus the defendant's office records (especially the lost diary or desk calendar as to which see further infra); or was the sole produce of said office records, and that said list to the extent that it was the product of said office records was made up during or after the search of the night of September 2-3, 1960, rather than being in existence prior thereto as claimed by the People.

The People admit, and the court finds that during the search of September 2-3, 1960, the People seized a diary

or desk calendar from the defendant's private office, and that said diary or calendar subsequently disappeared while in the custody of the People.

The People also admit, and the court finds that during the search of the night of September 2-3, 1960, the People made a detailed examination of the file of patients' index cards in the defendant's private office, and that the police took written notes thereof. In this connection the court further finds that the People have not produced such written notes in their entirety at the within hearing.

The People have not produced in this hearing any written notes or memoranda as to the contents of the lost diary or desk calendar. In the overall circumstances of this case, the conclusory assertions of the police witnesses that no information relevant to the issues of this proceeding was obtained by the People from the lost diary or desk calendar, cannot be taken probatively into account in the findings herein.

From the aforesaid findings it is concluded that the People obtain [sic] either from the wiretaps or from the search of September 2-3, 1960, or from both of these in combination, their original information or leads upon which subsequent charges of abortion, or upon which subsequent investigation in turn leading to charges of abortion, were based in the case of each of said females.

In as much as the arrest of the doctor was unlawful in that it was the fruit of wiretap activity now found by the court to have been illegal, the subsequent search of defendant's office immediately following his "arrest" was likewise unlawful. The People claim that the search was justified

because the defendant invited them to do so and consented thereto. There is a presumption against consent or waiver of a defendant's constitutional right to be free from unreasonable search and seizure and the People have the burden of affirmatively establishing free and voluntary consent (Johnson v. Zerbst, 304 U.S. 458; Pekar v. United States, 315 F. 2d 319; United States v. Smith, 308 2d 657, 663). The court finds that the People have failed to overcome this presumption and that the testimony concerning this phase of the proceedings, if anything, negates any such consent or waiver.

In view of the findings of the court, there is no need to make comment or evaluate the other points set forth in the briefs submitted by counsel for the defendant.

The motion is granted in all respects. Settle order.

APPENDIX E

Federal Constitutional Points Urged by Petitioner Before Justice Rinaldi, Supreme Court of New York, Kings County, Quoted from "Summary of Defendant's Points" in the Typewritten Memorandum of Law Before the Latter Court

(1) The wiretap order of July 28, 1960, was (a) unlawful and (b) unconstitutional. It was unlawful because issued in violation of the statutory requirement of "reasonable ground to believe that evidence of crime may be thus obtained" (Code Crim. Proc. §813-a); we shall show that this statutory standard of "reasonable ground' is (and since the decision of the *Mapp* case must be) construed as meaning the same as "probable cause" under the Fourth Amendment of the Federal Constitution. The statutory violation herein consisted, *first*, in the lack of a *reliably* founded showing of "reasonabe ground", i.e., the insufficiency of the supporting affidavits in that they were based on information allegedly given by Alvin Rosen and Audrey Salzman, informants of no proven reliability in regard to abortion charges against defendant Cohen or indeed against anyone. The statutory violation consisted, *second*, in the failure to show that a crime had actually been committed or was being then presently committed, as to which the wiretap would produce "evidence"; i.e., unless the affidavits showed that wiretap information would "evidence" a crime already allegedly committed or then being committed, then the wiretap must have been sought in order to obtain evidence of future crime, and this the statute does not authorize (nor does the Constitution). Further, even if the statute *arguendo* may be read as authorizing a wire-

tap upon "reasonable ground" to believe that evidence of future crime may be obtained, no such showing was made.

In any event, the statute is unconstitutional if read to authorize a wiretap for the obtaining of mere evidence as distinct from fruits or instrumentalities of a crime—a point which we develop rather fully later in this brief. Finally, the statute in allowing *any wiretapping at all* is unconstitutional in its entirety under the Supremacy Clause of the Federal Constitution (Art. VI) because, by establishing a permissive procedure for wiretapping, it contravenes §605 of the Federal Communications Act (Title 47 U.S.C.) as well as the Fourth Amendment (unreasonable searches) and the Fifth Amendment (self-incrimination) in combination with the Fourteenth Amendment (due process of law) of the Federal Constitution.

(2) The wiretap order being illegal and unconstitutional, all evidence obtained *via* the wiretap, whether consisting of leads or otherwise, is inadmissible under the amended §345(a) of the Civil Practice Act, now §4506 C.P.L.R., and should be ordered suppressed in the instant proceeding. It is important to note that the latter statute bars not only "evidence obtained through" an illegal wiretap but also "evidence * * * resulting from information obtained by any such act". In other words, evidence resulting from illegal wiretap-obtained *leads* is expressly barred by this statute.

(3) The amended §345(a) just mentioned is part of a nothing-less-than historic overhauling of the entire body of legislation in this State relating to both search-and-seizure in general and wiretapping in particular. This overhauling,

as we shall show in detail in this brief, has been done in obedience to the command of *Mapp* v. *Ohio*, 367 U.S. 643. The overhauling has included the adoption, for the first time in this State, of a comprehensive motion procedure for suppression of evidence obtained by illegal search (*Code Crim. Proc.* §§813-c to 813-e). This new motion procedure (invoked by us herein) is of special interest in one particular respect affecting the instant proceeding, i.e., the new motion procedure parallels the long-familiar Federal motion to suppress (Fed. Rules Crim. Proc. 41(e)) in which it is of the very essence of the procedure that the motion preferably be made at the earliest possible state before trial (see the explicit language to this effect in first sentence of *Code Crim. Proc.* §813-d). If, as we contend, these statutory changes in New York State (and the Federal Constitutional requirements which evoked them) have now imported into New York law the Federal standards of legal and reasonable search, then the new motion procedure (§§813-c et seq., *supra*) must include motions to suppress illegal wiretap evidence under the authoritative precedent of the parallel Federal motion procedure (F. R. Cr. P. 41 (e)) which applies to such wiretap situations (e.g., *United States* v. *Carney*, 188 F. Supp. 86 (E.D.N.Y. 1960)). Nor is this conclusion weakened by the fact that the New York §813-c refers only to "property, papers or things", because the Federal Rule 41(e) is even more restrictively worded (it mentions only "property") and yet it is applied by the Federal Courts in motion proceedings for the suppression of wiretap evidence and leads and not only for suppression of physical evidence seized in a search. Interestingly also,

both the New York (§813-c) and the Federal (Rule 41(e)) provisions contain a virtually identical sentence whose effect is to open up unlimitedly the power of the Court in such motion proceedings to decide the suppression issues in their most comprehensive scope ("The (Judge) (Court) shall (hear) (receive) evidence on any issue of fact necessary to the (decision) (determination) of the motion.").

(4) The illegal and unconstitutional wiretap was the indispensable source of the original alleged leads to all of the alleged female abortion complainants under the within five indictments. This topic takes up a major part of our detailed factual recitals later in this brief. Those leads and all evidence emanating therefrom should be suppressed. The conclusion just suggested that the leads came from the wiretap is indicated by even the limited testimony which the court allowed in this hearing concerning the wiretap operation. However, in view of the People's claim that these indicated wiretap leads were obtained in other ways, ways which were never satisfactorily (to put it mildly) explained by the People, and in view of the fact that this case involves both a wiretap and a subsequent search (both of which operations we contend were illegal), the question naturally arises as to whether or to what extent all or some of the leads came from that search which took place in defendant's office on September 3, 1960*. Unfortunately, the exploration of this extremely interesting question was severely handicapped by the unavailability of

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* This search and its illegality are more specifically noted in later paragraphs of this summary, and in our full argument treatment below.

the primary document which could have yielded the definitive answers to this question. This document, the defendant's office desk diary or calendar, was seized by the police in the search of September 3, 1960, but at the hearing herein they claimed they had "lost" or "misplaced" it. Thus, the People first tried to block altogether any disclosure of whether the leads came from the wiretap, they then tried to obscure such disclosure further by raising a cloud of vague hints and ambiguous assertions as to claimedly legal sources of such leads, and finally by "losing" or "misplacing" the all important desk diary they effectively blocked disclosure of whether the leads came from the illegal search and ultimate seizure of the desk diary rather than from the illegal wiretap. We argue in Point IV of this brief that this overall conduct of the People is in itself a sufficient ground requiring the granting of our motion to dismiss.

(5) Specifically, the illegal and unconstitutional wiretap was the indispensable source of the alleged lead to the alleged abortion complainant Esther Richards. The situation involving Esther Richards on September 2 and 3, 1960 was the sole ostensible basis for the arrest of the defendant on September 3 and for the search made assertedly incident to that arrest. Neither the search nor the arrest were made upon a warrant; they were based solely on the police officers' asserted probable cause to believe that the crime of abortion on Esther Richards had been committed; and this asserted probable cause, as just mentioned, was based on alleged happenings which were the product of illegal and unconstitutional wiretap leads.

Appendix E—Federal Constitutional Points Urged by Petitioner Before Justice Rinaldi, etc.

(6) We contend also that the defendant did not consent to the search of September 3, 1960, and that the People have not sustained their burden of proving any such consent or waiver.

(7) A further constitutional infirmity in the search is that it was unreasonable in scope and too remote in time from the arrest, insofar as it included a search of defendant's office in Brooklyn, the arrest having been made earlier at the defendant's home in Neponsit, Queens.

(8) The search was constitutionally obnoxious for the further reasons that it was unreasonable as a warrantless search made in the nightime, and that the overall conduct of the officers and the District Attorney preceding and during the arrest and search was unreasonable in the total atmosphere of the case; these overall features of the situation are additionally noted in later paragraphs of this summary. All evidence obtained in the search of September 3, 1960, and all evidentiary leads therefrom and the products of such leads, should be suppressed.

(9) An additional point which we urge with regard to the Esther Richards' situation is that the evidence allegedly obtained from her by the police on September 2, 1960—when she was forcibly intercepted and detained while riding in the private automobile of a friend, subjected to lengthy interrogation, forced to go to Kings County Hospital and there to undergo a gynecological examination, and thereafter forced to go to the District Attorney's office where she was subjected to further prolonged interrogation—should be suppressed because, in the overall circum-

stances thus presented, this was not "legal" evidence within the meaning of Code Crim. Proc. §249. We respectfully contend that, by virtue of the last-mentioned special statutory restriction in this State and under the tests laid down by the Supreme Court of the United States for evaluating the overall reasonableness of a search-and-seizure situation in terms of the "total atmosphere of the case" (see citations *infra*) and the overall conduct of the police officers, this extraordinary police conduct in extracting the alleged Esther Richards evidence is a matter which the defendant has legal standing to raise even though it was not he himself who was the direct and immediate physical victim of this police action.

(10) Further as to the search of September 3, 1960 and its relation to the wiretap:—Policewoman O'Meara inspected, during the search of defendant's office, his patients' index cards and his desk calendar or diary; the latter item she seized and took with her. Her inspection of these items was made with a view to checking a list which she had brought with her to defendant's office for this purpose. This list, which included names of female patients of the defendant, dates of their visits to the defendant, and other information, was at least in very large part the product of the illegal and unconstitutional wiretap. Thus, by utilizing the illegal wiretap-obtained list in conjunction with the illegally search-obtained index cards and diary, the police compounded the illegality of both the wiretap-obtained evidence and the search-obtained evidence.

(11) The overall circumstances of due process unfairness, as well as Fourth Amendment unconstitutionality,

which arise from the situation mentioned in the preceding paragraphs are aggravated by conduct of the police (or of the District Attorney's office, or of both) which, if it does not actually point to deliberate spoliation of evidence, at least points to the dire constitutional necessity of protecting the defendant against the consequences of a remarkable series of destructions, losses, misplacings and otherwise-occurring unavailability of records that are vital to the just determination of the within motion for suppression of evidence. The single most striking instance of this is the alleged loss or misplacing of defendant's desk calendar or diary, which was admittedly utilized by the police to develop leads for the indictment charges in conjunction with the wiretap-obtained leads.

(12) The overall due process unfairness of the tactics of the police and the District Attorney's office is aggravated also by their improper attempts to play cat-and-mouse with the defendant and with this Court in regard to various important facts of the admitted wiretap operations. The District Attorney insisted that disclosure of the contents of the wiretap—and even of individual police officers' participation in the wiretapping—should not be required in this proceeding because it would be a violation of Federal law, yet he blandly represented his readiness to make such disclosures at the trial of the indictments. Such a cynical announcement by a public prosecutor that he will himself choose the forum in which to violate the Federal law against wiretapping not only vitates any ostensible legal or good-faith justification for the Prosecutor's refusal to make the disclosure in this proceeding, but it also amounts to a

method of prosecution so outrageously unfair as to constitute a violation of due process of law.

(13) Finally, we shall develop at appropriate places throughout this brief the distressingly numerous instances in which the veracity of the police witnesses was indicatedly questionable. This unhappy theme needs to be developed because of its bearing on the previously mentioned tests which the United States Supreme Court has promulgated for the evaluation of the Fourth Amendment reasonableness of searches in terms of the "total atmosphere of the case" and the overall conduct of the police officers.

APPENDIX F

Federal Constitutional Points Urged by Petitioner Before the Appellate Division, Second Department, Supreme Court of New York, Quoted from Index to "Respondent's Brief" in the Latter Court

POINT I—The proceedings in the Court below were not barred, on any principle of *res judicata* or collateral estoppel, by reason of anything derivable from the proceedings before Mr. Justice Arkwright.

POINT II—The Court below had jurisdiction, power and authority to entertain and to decide the motion in its entirety, including the part of the motion addressed to the validity of the ex parte wiretap order.

POINT III—The Court below correctly ruled that the ex parte wiretap order was invalid under Code Crim. Proc. §813-a because based upon an inadequate showing of "reasonable grounds" and that the wiretap evidence and leads should be suppressed pursuant to C.P.L.R. §4506.

POINT IV—A. The following rulings of the Court-below are not directly assailed by the People in this appeal but are merely viewed by the People as "irrelvant":—(1) That the evidence on which the indictments were based was derived from wiretapping or from the search of September 2-3, 1960, or from both sources; (2) that the arrest and search of September 2-3, 1960 were unconstitutional both by reason of their being integrally connected with and derived from the antecedent illegal wiretap, and by reason of the utter lack of "probable cause" aside from the wiretap-obtained leads; and (3) that the search was not validated by any consent or waiver.

Appendix F—Federal Constitutional Points Urged by Petitioner Before the Appellate Division, etc.

B. In view of the People's eschewal of argument on these issues, they should be deemed non-litigated by the People for the purposes of this appeal.

POINT V—In regard to both the wiretapping and the search, i.e., viewing the overall conduct of the police in this case in constitutional terms, the order appealed from is proper because the conduct of the police officers fell far below the standards established by the Supreme Court of the United States under the test of "the overall atmosphere of the case":

The Applicable Fourth Amendment Standards: The Tests Laid Down By The Supreme Court Of The United States As To "The Total Atmosphere Of The Case" And "Particularized Evaluation Of The Conduct Of The Officers" Both Prior To And During The Arrest Or Search.

Spoliation of Evidence and Improper Keeping of Records.

The Unreasonable Extension Of The Scope Of The Search To Include Defendant's Office Premises In Brooklyn.

The Extraordinary Conduct of the Police in Extracting Alleged Admissions From The Complainant Esther Richards.

APPENDIX G

Points Urged by the Prosecution in the Appellate Division, Second Department, Supreme Court of New York, Quoted from Index to "Appellant's Brief" in the Latter Court

POINT I—The court below should have refused to entertain the motion under the principle of res judicata. The denial of the prior motion by Arkwright, J. (order of February 26, 1963) determined the law of the matter and precluded an application to any other justice of the same court for the same relief.

POINT II—The court below lacked power to entertain the motion to determine whether or not there had been illegal and unlawful use of wiretaps and for the suppression of evidence thereby procured.

POINT III—The original wiretap order of July 28, 1960 was validly issued upon proper affidavits.

POINT IV—The findings of fact made by the court below are irrelevant to the issue of this appeal.

POINT V—The order appealed from should be reversed.

APPENDIX H

Federal Constitutional Points Urged by Petitioner Before the New York Court of Appeals, Quoted from Index to "Appellant's Brief" in the Latter Court

POINT I—The proceedings before Mr. Justice Rinaldi were not barred, on any principle of *res judicata* or collateral estoppel, by reason of anything derivable from the proceedings before Mr. Justice Arkwright.

POINT II—Mr. Justice Rinaldi had jurisdiction and power to entertain and to decide the motion in its entirety, including the part of the motion addressed to the validity of the wiretap order.

POINT III—A. The unelaborated conclusion of the Appellate Division that the wiretap affidavits were sufficient is error.

B. Mr. Justice Rinaldi correctly ruled that the wiretap affidavits were insufficient under the "reasonable grounds" requirement of Code Crim. Proc. §813-a.

C. If the wiretap affidavits be deemed in compliance with §813-a, there must then be reached the question of the constitutionality of that statute as applied to this case, and we urge that the statute as so applied is unconstitutional under the Federal Fourth Amendment because it authorizes a search for evidence of crime and not solely for property or for fruits or instrumentalities of crime.

POINT IV—People v. Dinan, 11 N.Y. 2d 350 should be overruled, and all evidence obtained or derived directly or indirectly from wiretapping in this case should be ex-

Appendix H—Federal Constitutional Points Urged by Petitioner Before the New York Court of Appeals, Quoted from Index to "Appellant's Brief" in the Latter Court

cluded as violative of Federal Constitutional and Statutory Prohibitions, if the Court should find it necessary to reach these constitutional questions, i.e., if the wiretap evidence herein is not excluded on the ground of the insufficiency of the affidavit or on other anterior grounds.

POINT V—The judgment appealed from should be reversed because it was evidently rendered without regard to the issues, which were deemed independently decisive by Mr. Justice Rinaldi, as to the inextricably interwoven character of the wiretap with the indisputably unconstitutional search of September 2-3, 1960; and because in several other aspects relating to both the wiretapping and the search, i.e., viewing the overall conduct of the police in this case in constitutional terms, the conduct of the police officers fell far below the standards established by the Supreme Court of the United States under the test of "the overall atmosphere of the case".

Introductory: The Problem Of The Relationship Between the Search And The Wiretap.

The Applicable Fourth Amendment Standards: The Tests Laid Down By The Supreme Court Of The United States As To "The Total Atmosphere Of The Case" And "Particularized Evaluation Of The Conduct Of The Officers" Both Prior To And During The Arrest Or Search.

Spoliation of Evidence and Improper Keeping of Records.

Appendix H—Federal Constitutional Points Urged by Petitioner Before the New York Court of Appeals, Quoted from Index to "Appellant's Brief" in the Latter Court

The Unreasonable Extension Of The Scope Of The Search To Include Defendant's Office Premises In Brooklyn.

The Extraordinary Conduct of the Police In Extracting Alleged Admissions From The Complainant Esther Richards.

Conclusion To Point V: Further Remarks As To The Relationship Between The Wiretap And The Search, And As To The Possible Need For A Remand For Further Proceedings.

APPENDIX I

Points Urged by the Prosecution Before the New York Court of Appeals, Quoted from Index to "Respondent's Brief" in the Latter Court

POINT I—Code Crim. Pro. Section 813-a offends no Federal or New York State constitutional provision.

POINT II—The original wiretap order of July 28, 1960 was legally issued upon proper affidavits.

POINT III—The Appellate Division erred in holding that the denial by Arkwright, J. of the first motion to vacate and set aside the wiretap order of July 28, 1960 did not reach the question of the validity of that order and therefore did not bar a relitigation of an identical motion before Rinaldi, J. The Arkwright denial determined the law of the matter and precluded an application to any other Justice of the same court for the same relief.

POINT IV—No remand for further hearings is necessary.

The court should enunciate a rule prohibiting pre-trial motions to inspect wiretap affidavits and orders.

POINT V—The order appealed from should be modified so as to restrain and preclude the People from using upon the trial of the appellant only articles of evidence seized or examined by police officers of the City of New York in the defendant's home on September 2nd and 3rd, 1960, and any and all leads and clues revealed or any information directly or indirectly obtained as a result of the use of articles of evidence so seized or examined; and as so modified, the order of the Appellate Division should be affirmed.

APPENDIX J

Statutes Involved

1. 47 U.S.C. §605

§ 605. Unauthorized publication or use of communications

No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such

information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided,* That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress. June 19, 1934, c. 652, Title VI, § 605, 48 Stat. 1103.

2. N.Y. Code Crim. Proc. §518-a

§ 518-a. Appeal from order granting motion for return of property or suppression of evidence, confession or admission; how taken

In taking an appeal from an order granting a motion for the return of property or suppression of evidence or for the suppression of a confession or admission pursuant to subdivision six of section five hundred eighteen, the people must file, in addition to a notice of appeal as required by section five hundred twenty-two, a statement asserting that the deprivation of the use as evidence of the property ordered to be returned or suppressed, or of the confession or admission ordered to be suppressed, has rendered the sum of the proof available to the people with respect to a criminal charge which has been filed in a court, or which the people propose to file or to cause to be filed in a court, either (1) insufficient as a matter of law, or (2) so weak in its entirety that any reasonable possibility of prosecuting such charge or prospective charge to a conviction has been effectively destroyed.

The taking of such an appeal and the filing of such a statement shall constitute a bar to (1) the filing of any criminal charge against the moving party involving the property in question, and (2) the prosecution of any existing criminal charge against the moving party involving the property, confession or admission in question, unless and until the order of return or suppression is reversed on appeal and vacated. Added L. 1962, c. 954, § 3; amended L. 1965, c. 846, § 3, eff. July 16, 1965.

3. N.Y. Code Crim. Proc. §813-a

§813-a. Ex parte order for eavesdropping

An ex parte order for eavesdropping as defined in subdivisions one and two of section seven hundred thirty-eight of the penal law may be issued by any justice of the supreme court or judge of a county court or of the court of general sessions of the county of New York upon oath or affirmation of a district attorney, or of the attorney-general or of an officer above the rank of sergeant of any police department of the state or of any political subdivision thereof, that there is reasonable ground to believe that evidence of crime may be thus obtained, and particularly describing the person or persons whose communications, conversations or discussions are to be overhead or recorded and the purpose thereof, and, in the case of a telegraphic or telephonic communication, identifying the particular telephone number or telegraph line involved. In connection with the issuance of such an order the justice or judge may examine on oath the applicant and any other witness he may produce and shall satisfy himself of the existence of reasonable grounds for

Appendix SB, Notice of Motion, Affidavit and Brief for Re-Argument in New York Court of Appeals

Appendix 8B, Notice of Motion, Affidavit and Brief for Re-Argument in New York Court of Appeals

Court of Appeals

STATE OF NEW YORK

Appeal No. 223 (Decided July 7, 1966)

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

—against—

CARL I. COHEN,

Appellant.

NOTICE OF MOTION, AFFIDAVIT AND BRIEF FOR RE-ARGUMENT

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Court of Appeals

State of New York

Appeal No. 223 (Decided July 7, 1966)

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

—against—

CARL I. COHEN,

Appellant.

Notice of Motion for Re-argument

SIRS:

PLEASE TAKE NOTICE that, upon the annexed affidavit of Eugene Gold, Esq., sworn to September 19, 1967, upon all the proceedings heretofore had herein, including proceedings in the Supreme Court of the United States, and upon the brief annexed hereto, the undersigned will move before the Court of Appeals of the State of New York, at its Courthouse in Albany, New York, on September 25, 1967, at 10:00 a.m., or as soon thereafter as counsel can be heard, for re-argument of the appeal above captioned, which was decided by the Court of Appeals as Appeal No. 223 on July 7, 1966, 18 N.Y. 2d 650.

Yours, etc.

KLEINMAN, GOLD & LANDSMAN
Attorneys for Appellant-Movant
Carl I. Cohen
66 Court Street
Brooklyn 1, New York

EUGENE GOLD
Of Counsel

Notice of Motion for Re-argument

To:

Hon. Aaron E. Koota
District Attorney, Kings County

Hon. Raymond J. Cannon, Clerk
Court of Appeals of the State of New York
Albany, New York

Affidavit in Support of Motion for Re-argument

COURT OF APPEALS

STATE OF NEW YORK

Appeal No. 223 (Decided July 7, 1966)

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

—against—

CARL I. COHEN,

Appellant.

STATE OF NEW YORK }
COUNTY OF KINGS } ss.:

EUGENE GOLD, being duly sworn, deposes and says:

I am one of the attorneys for the appellant-movant herein, Carl I. Cohen. I make this affidavit in support of the within motion for re-argument.

There has been one previous motion for re-argument on behalf of the appellant Cohen in this appeal (denied February 16, 1967, Motion No. 111, 19 N.Y. 2d 673); that prior motion for re-argument occurred in a setting of fact and law not related to the grounds for the present (second) motion for re-argument.

The within appeal was decided by this Court on July 7, 1966, 18 N.Y. 2d 650. Certiorari and re-hearing were denied by the Supreme Court of the United States on December 5, 1966, and January 16, 1967, respectively (— U.S. —, 17 L. Ed. 2d 438; — U.S. —, 17 L. Ed. 2d 680) (Oct. Term 1966, no. 614). The denial of certiorari was "for want of a final judgment".

Affidavit in Support of Motion for Re-argument

For reasons developed *infra* in this affidavit, and in the brief filed herewith, there are two circumstances in connection with the latter denial of Federal certiorari (and of Federal re-hearing) which are believed to have a significant bearing on our present motion for re-argument in this Court, namely, (1) the fact just mentioned that the denial of certiorari was "for want of a final judgment", and (2) the fact that said denial of certiorari (and of re-hearing) antedated by some six months the decision of the United States Supreme Court in *Berger v. New York*, — U.S. —, 18 L. Ed. 2d 1040, decided June 12, 1967.

The appeal which was before this Court in the present case, and in which we are now seeking re-argument, arose as follows:—The appellant-movant Carl I. Cohen (a physician) was indicted for abortion in Kings County. In a pre-trial proceeding in the abortion prosecution the District Attorney acknowledged on the record (R. 71, 85-87)* that Dr. Cohen's office telephone had been wiretapped pursuant to *ex parte* Court order, prior to his arrest and indictment. There had also been a search of Dr. Cohen's home and office at the time of his arrest (pre-indictment).

Proceedings were instituted on Dr. Cohen's behalf for suppression of evidence obtained by the wiretap and the search. This latter motion to suppress was heard by Mr. Justice Rinaldi, Supreme Court, Kings County. Mr. Justice Rinaldi invalidated both the wiretap and the search (42 Misc. 2d 403). On appeal by the People to the Appellate Division, Second Department, Mr. Justice Rinaldi's invalidation of the search was affirmed, but his decree was modified so as, in effect, to reinstate the wiretap evidence as having been legally obtained (24 A.D. 2d 900). Dr. Cohen appealed (by leave) to this Court from the modification order of the Appellate Division. This Court affirmed the

* This refers to the printed Record on Appeal in this Court in the within appeal.

order of the Appellate Division, Chief Judge (then Judge) Fuld dissenting in a memorandum in which then Chief Judge Desmond concurred, the dissent stating in part as follows (18 N.Y. 2d 650):

> "I adhere to the views I expressed in People v. Dinan (11 N.Y. 2d 350, 357)—that evidence should be excluded if obtained by interception of telephone communications in contravention of the Federal Communications Act, and, accordingly, vote to reverse * * *".

As above recited the Supreme Court of the United States denied certiorari to review this Court's latter decision, the denial being "for want of a final judgment" (— U.S. —, 17 L. Ed. 2d 438).

In our printed brief in the within appeal before this Court we expressly raised the question of the Federal Fourth Amendment constitutionality of Code Crim. Proc. §813-a, the permissive wiretap legislation, and we also expressly urged that *People* v. *Dinan*, 11 N.Y. 2d 350 should be overruled and that all evidence obtained or derived directly or indirectly from wiretapping in this case should be excluded on Federal constitutional grounds (see the printed "Appellant's Brief and Appendix" just referred to, at pp. 45, 53-59).

As noted, the Supreme Court of the United States did not decide *Berger* v. *New York, supra*, until some six months after the denial of certiorari in the present case and until nearly a year after this Court's affirmance of the decision of the Appellate Division which upheld the validity of the wiretapping at Dr. Cohen's office.

Since we respectfully believe that one necessary effect of the *Berger* decision in the Supreme Court of the United States was the invalidation of §813-a as to telephone wiretapping (and not only as to electronic room "bugging"),

we submit that an appropriate and indeed compelling situation is presented for reargument of the within appeal pursuant to Rule XX of this Court. In our brief annexed hereto we show in detail the impact of the *Berger* case on the questions of the Federal constitutionality of (1) State telephone wiretapping in general and (2) the New York permissive wiretap legislation in particular.

Since, as above recited, the People have admitted the use of wiretapping in this case, and since (as pointed out in our aforementioned printed brief in this Court, pp. 5-6, 13-25, 60-61, 74-75) this prosecution indisputably cannot be maintained without the wiretap evidence or evidentiary leads because the search-obtained evidence (being the only alternative source) has already been adjudicated as unconstitutional in this case (*supra*), a determination by this Court as to the constitutionality of the wiretap in the light of *Berger* would appear to be an altogether proper and necessary further step in this case *via* the Rule XX reargument procedure.

Further as to the previously mentioned fact that the denial of certiorari in this case last January (preceding *Berger*) was "for want of a final judgment", I would respectfully note that this language of the Supreme Court of the United States negates in the plainest way any intimation that that Court was expressing any judicial evaluation of the Federal constitutional merits of our wiretap contentions in this case when it denied certiorari. It is familiar in any event that a denial of certiorari "imports no expresson of opinion on the merits of the case, as the Bar has been told many times". *United States* v. *Carver*, 260 U.S. 174, 181; and see the extensive discussion in *Stern* and *Gressman, Supreme Court Practice* (3rd Ed.), pp. 179-184.

No previous application has been made for the relief herein sought on the grounds herein advanced; that is, the

present motion for reargument is based upon the supervening effect of the decision of the Supreme Court of the United States in *Berger* v. *New York, supra,* whereas our prior motion for reargument (cited near the outset of this affidavit) was in a wholly different setting and on grounds wholly unrelated hereto.

Wherefore it is respectfully prayed that this motion for reargument should be granted in all respects.

EUGENE GOLD

Sworn to and subscribed to before me
this 19th day of September, 1967

MARK A. LANDSMAN
412248425
Qualified in Queens
Filed in Kings
Commission expires March 30, 1969

Court of Appeals

State of New York

Appeal No. 223 (Decided July 7, 1966)

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

—against—

CARL I. COHEN,

Appellant.

BRIEF IN SUPPORT OF MOTION FOR REARGUMENT

This brief is respectfully submitted in support of the within motion for reargument by the appellant-movant, Dr. Carl I. Cohen.

This brief will be confined to an item-by-item presentation of those portions of the decision of the Supreme Court of the United States in *Berger* v. *New York*, — U.S. —, 18 L. Ed. 2d 1040, which are believed by us to support the contention that the *Berger* case has invalidated, for all practical constitutional purposes, State telephone wiretapping in general unless done in compliance with the Fourth Amendment, and this State's permissive wiretapping legislation in particular (Code Crim. Proc. §813-a) as being on its face violative of the Fourth Amendment.

(All of our references *infra* to the *Berger* decision of the United States Supreme Court are to the *pamphlet* issue of 18 L. Ed. 2d, No. 7, dated July 17, 1967.)

Preliminarily, it will be recalled that *Berger*, on its facts, involved electronic room "bugging", rather than telephone wiretapping—although, as we shall note *infra*, there are

significant expressions in the dissenting opinion of Mr. Justice Harlan in *Berger* which evidently equate or assimilate telephone wiretapping and room "bugging" with reference to one factual incident in the *Berger* record that did involve "search" of telephone conversation, namely, the picking-up on the Neyer room "bug" of a telephone conversation between Neyer and Berger.

The following recital of the pertinent items from the several separate opinions in *Berger* is designed, then, to focus attention upon the necessary decisional and doctrinal impact of *Berger* upon the issue of the Federal Fourth Amendment constitutionality of State telephone wiretapping and of the New York permissive legislation here involved.

(1) Early in the opinion of the majority Justices in *Berger*, by Mr. Justice Clark, there is a historical review of telephone wiretapping as constituting a form of "eavesdropping" (18 L. Ed 2d at pp. 1044-1046), it being evident moreover from the majority opinion as a whole (details *infra*) that the Court—indeed also all of the Justices who wrote separate opinions (*infra*)—was treating undifferentiatedly, for Fourth Amendment purposes, telephone wiretapping and electronic room "bugging".

(2) In the portion of Mr. Justice Clark's opinion (for the Majority) numbered "III" (18 L. Ed. 2d at pp. 1046-1047), there is similar undifferentiated reference to the right "of individual privacy" under the Fourth Amendment.

(3) In the portion of Mr. Justice Clark's opinion numbered "IV" (18 L. Ed. 2d at pp. 1047-1049), we find the very significant announcement by the Court that *Olmstead* v. *United States*, 277 U.S. 438, the first telephone wiretap case which reached the Supreme Court, had been "negated [for Fourth Amendment purposes] by our subsequent cases * * *"; that those subsequent cases "found 'conversation' was within the Fourth Amendment's protections, and that

the use of electronic devices to capture it was a 'search' within the meaning of the Amendment, and we so hold." Immediately after this Mr. Justice Clark went on to note the post-*Olmstead* Federal legislation against telephone wiretapping, and the *Nardone* cases which extended the exclusionary rule to wiretap evidence in federal prosecutions (18 L. Ed. 2d p. 1048). In this same portion of the majority opinion the Court also emphasized, with the use of the word "significantly", the language in *Silverman* v. *United States*, 365 U.S. 505, that technical "trespass" is not the essence of the test of constitutionality of "eavesdropping" under the Fourth Amendment, but "It is based upon the reality of an actual intrusion into a constitutionally protected area" (*ibid*). This theme of the significance of intrusion into a constitutionally protected area—a theme obviously applicable to telephone wiretapping equally with room "bugging"—recurs throughout the several *Berger* opinions (*infra*).

(4) In the portion of Mr. Justice Clark's opinion numbered "V" (18 L.Ed. 2d at pp. 1049 *et seq.*), the Court again emphasized the Fourth Amendment protection of "privacy" and noted that this protection had already been applied to the States (*id.*, at p. 1049).

(5) Also in "V" of Mr. Justice Clark's opinion the Court took up a detailed textual analysis of New York's Code Crim. Proc. §813-a (*id.*, at pp. 1049-1053). Throughout this analysis of the statute the Court in *Berger* treated the issues as being Fourth Amendment issues; it plainly treated the statute as permitting "eavesdropping" or "electronic devices" as methods of "search" within the meaning of the Fourth Amendment, it referred again to such "searches" as occurring electronically within "constitutionally protected areas", and it condemned the New York legislation on several Fourth Amendment grounds ("general warrant", improper duration of the search, and failure to require a showing of "exigent circumstances" in justification

of "secrecy" or "unconsented entry")—and throughout this entire portion of the Majority opinion in *Berger* the discussion made no differentiation as between room "bugging" and telephone wiretapping under the New York State permissive legislation.

(6) In the portion of Mr. Justice Clark's opinion numbered "VI" (18 L.Ed. 2d at pp. 1053-1055), where the Court discussed *inter alia* the current debate over the needs of law enforcement *versus* the Fourth Amendment prohibition against electronic searches in constitutionally protected areas, the Court made copious reference to data of telephone wiretapping, it referred also to "the fantastic advances in the field of electronic communication [which] constitute a great danger to the privacy of the individual", and it concluded as follows (*id.*, at pp. 1054-1055):

> "In any event we cannot forgive the requirements of the Fourth Amendment in the name of law enforcement. This is no formality that we require today but a fundamental rule that has long been recognized as basic to the privacy of every home in America. While '[t]he requirements of the Fourth Amendment are not inflexible, or obtusely unyielding to the legitimate needs of law enforcement,' Lopez v. United States, supra, 373 US at 464, 10 L ed 2d at 485, dissenting opinion of Brennan, J., it is not asking too much that officers be required to comply with the basic command of the Fourth Amendment before the innermost secrets of one's home or office are invaded. Few threats to liberty exist which are greater than that posed by the use of eavesdropping devices. Some may claim that without the use of such devices crime detection in certain areas may suffer some delays since eavesdropping is quicker, easier, and more certain. However, techniques and practices may well be developed that will operate just as speedily and certain—and what is more important—without attending illegality.

It is said that neither a warrant nor a statute authorizing eavesdropping can be drawn so as to meet the Fourth Amendment's requirements. If that be true then the 'fruits' of eavesdropping devices are barred under the Amendment. On the other hand this Court has in the past, under specific conditions and circumstances, sustained the use of eavesdropping devices. See Goldman v United States, supra; On Lee v United States, supra; Lopez v United States, supra; and Osborn v United States, supra. In the latter case the eavesdropping device was permitted where the 'commission of a specific offense' was charged, its use was 'under the most precise and discriminating circumstances' and the effective administration of justice in a federal court was at stake. The States are under no greater restrictions. The Fourth Amendment does not make the 'precincts of the home or office . . . sanctuaries where the law can never reach.' Douglas, J., dissenting in Warden, Maryland Penitentiary v Hayden, supra, but it does prescribe a constitutional standard that must be met before official invasion is permissible. Our concern with the statute here is whether its language permits a trespassory invasion of the home, by general warrant, contrary to the command of the Fourth Amendment. As it is written, we believe that it does.

Reversed."

(7) In the concurring opinion of Mr. Justice Douglas (18 L. Ed. 2d at pp. 1055-1057), the opinion of the Court (by Mr. Justice Clark) is hailed, "because at long last it overrules sub silentio *Olmstead* v. *United States* * * * and its offspring and brings wiretapping and other electronic eavesdropping fully within the purview of the Fourth Amendment" (*id.*, at p. 1055). Mr. Justice Douglas then immediately adds (*ibid*):

> "• • • I also join the opinion because it condemns electric surveillance, for its similarity to the general warrants out of which our Revolution sprang and allows a discreet surveillance only on a showing of 'probable cause.' These safeguards are minimal if we are to live under a regime of wiretapping and other electronic surveillance."

And then, recurrently throughout his concurring opinion, Mr. Justice Douglas continues to speak undifferentiatedly of telephone wiretaps and other electronic eavesdropping (*id.*, pp. 1056-1057).

(8) In the concurring opinion of Mr. Justice Stewart (18 L. Ed. 2d at pp. 1057-1058), we again find undifferentiated references, throughout, to the Fourth Amendment formulation of the electronic eavesdropping issues presented by §813-a; and reference also to "electronic eavesdropping for a 60-day period" as involving "a broad invasion of a constitutionally protected area" which ["o]nly the most precise and rigorous standard of probable cause should justify" (*id.*, p. 1058). It is noteworthy that the *ratio decidendi* of Mr. Justice Stewart's concurring opinion was the Fourth Amendment inadequacy of the *Berger* affidavits in support of the permissive *ex parte* judicial eavesdrop orders—a point which is importantly involved also in the within appeal of Dr. Cohen (printed brief of the appellant herein at pp. 45 et seq.).

(9) In the dissenting opinion of Mr. Justice Black (18 L. Ed. 2d at 1059-1069), it is stated that "the Court • • • holds the New York eavesdropping statute *on its face* violative of the Fourth Amendment" (*id.*, at 1059—italics in original). Mr. Justice Black also formulates what he terms the Court's "syllogism" at *id.* pp. 1062-1063, in which telephone wiretapping and other electronic eavesdropping are expressly included by Mr. Justice Black as being undifferentiated for Fourth Amendment purposes. Mr. Justice

Black also expresses his dissent from the Court's effective overruling of *Olmstead*, a telephone wiretapping case (*id.*, at pp. 1063-1065).

(10) In the dissenting opinion of Mr. Justice Harlan (18 L. Ed. 2d at pp. 1069-1080), there occurs the very interesting point or reference that in this very case of Dr. Cohen, Mr. Justice Rinaldi (in granting the motion to suppress evidence) had emphasized the stringent (as viewed by Mr. Justice Harlan) requirements of §813-a in regard to *ex parte* judicial orders for telephone wiretaps; and, Mr. Justice Harlan observes, " • • • there was no suggestion there or elsewhere that eavesdropping orders [as distinct from telephone wiretap orders] should be differently treated" (*id.*, at pp. 1071-1072). We respectfully emphasize this item in Mr. Justice Harlan's dissenting opinion as having a really quite striking importance for our present application for reargument, i.e., is it not striking that Mr. Justice Harlan's dissent in *Berger* invoked the facts and the law of this very case of Dr. Cohen with a view to showing that (in Mr. Justice Harlan's view) the New York permissive eavesdropping legislation is satisfactory for room "bugging" purposes because the New York State Courts treat room "bugging" under the same standards of Fourth Amendment care as they treat telephone wiretapping. It would be hard to imagine a more vivid formulation, by a Judge (of the highest Court in the land) of the total identity or assimilativeness of telephone wiretapping and electronic room "bugging" within the meaning of §813-a, than this reasoning of Mr. Justice Harlan's.

(11) Another item in Mr. Justice Harlan's dissenting opinion deserves special attention. This is the item, referred to previously, which relates to the pick-up in the Neyer room eavesdrop (in the *Berger* case) of the telephone conversation between Neyer and Berger. Mr. Justice Harlan treated this item as having Fourth Amendment significance in the *Berger* case, and he did so moreover in

deciding the delicate and difficult issue of Berger's "standing" to raise the Fourth Amendment issue with respect to the Neyer eavesdrop (18 L. Ed. 2d at pp. 1078-1079).

(12) Finally, in the dissenting opinion of Mr. Justice White in *Berger* (18 L. Ed. 2d at pp. 1080—et seq.), the Justice (adhering to the same consistent theme above noted) views the majority opinion as amounting to an undifferentiated constitutional condemnation of the New York permissive eavesdrop statutes for all types of electronic surveillance or search. See *id.* at p. 1083. And see especially, at *id.* p. 1084, the following:

> "• • • today's majority does not, in so many words, hold that all wiretapping and eavesdropping are constitutionally impermissible. But by transparent indirection it achieves practically the same result by striking down the New York statute • • •."

On the same page (1084), and again on p. 1086, Mr. Justice White repeats his protest against the Majority's undifferentiated constitutional condemnation of wiretapping and other electronic eavesdropping in the state statutory setting of the *Berger* case.

CONCLUSION

It is respectfully submitted that, on the basis of the grounds and reasons set forth in this brief and in the within motion papers, the motion for reargument should be granted in all respects.

Respectfully submitted,

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Appendix SC, Appellant's Brief on Re-Argument in New York Court of Appeals

Appendix 5C. Appellant's Brief on Re-Argument in
[redacted]w York Court of Appeals

Court of Appeals

State of New York

Appeal No. 223 (Decided July 7, 1966)

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

—against—

CARL I. COHEN,

Appellant.

APPELLANT'S BRIEF ON RE-ARGUMENT

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Court of Appeals

STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

—against—

CARL I. COHEN,

Appellant.

APPELLANT'S BRIEF ON RE-ARGUMENT

Statement; The Questions Presented in This Re-argument

By order of December 29, 1967 this Court granted the appellant's motion for re-argument of this appeal.

The motion for re-argument urged that the decision of the Supreme Court of the United States in *Berger* v. *New York*, 388 U.S. 41, 18 L.Ed. 2d 1040, decided June 12, 1967, had the necessary effect of voiding ex parte court orders authorizing telephone wiretapping under Code Crim. Proc. §813-a, including the wiretap order at issue in the present case.

The telephone wiretap issue is presented in this case in the following way: The appellant, Carl I. Cohen, is a physician. In December 1960 Dr. Cohen was indicted in Kings County for abortion (5 indictments) (R. 7 et seq.). On July 28, 1960 an ex parte court order had been issued for the tapping of Dr. Cohen's office telephone in Brooklyn (R. 21-22). The telephone was tapped continuously from July 29

to September 2, 1960 (R. 563). On the night of September 2-3, 1960 Dr. Cohen was arrested in Queens, and his home in Queens and office in Brooklyn were searched (R. 563).

A motion to suppress evidence obtained by the search and the wiretap was granted after a hearing by Mr. Justice Rinaldi, Supreme Court, Kings County (42 Misc. 2d 403). On appeal by the People to the Appellate Division, Second Department, Justice Rinaldi's order of suppression was affirmed as to the search but modified so as to reinstate the wiretap evidence (24 A.D. 2d 900). Dr. Cohen then appealed, by leave, to this Court, requesting invalidation of the wiretap, but this Court affirmed the judgment of the Appellate Division without opinion, Chief Judge Desmond and (then) Judge Fuld dissenting (18 N.Y. 2d 650). It is the latter decision of the Court which is now before the Court for reargument. (The Supreme Court denied certiorari (385 U.S. 976, December 5, 1966; reh. Den. 385 U.S. 1032, January 16, 1967) "for want of a final judgment.")

It appears that, owing to supervening circumstances, the points or questions which need to be considered in this reargument go beyond the question only of whether *Berger* v. *New York, supra,* has the effect of voiding Code Crim. Proc. § 813a as a basis for telephone wiretap orders in this State, or whether the *Berger* case has made all State wiretapping subject to the Fourth Amendment—these last being the questions immediately comprehended within our motion for reargument. The supervening or intervening circumstances just referred to have been this Court's decisions in the *Kaiser, Morhouse* and *Sarisohn* cases, *infra,* decided December 15, 1967, the decision of the Supreme Court of the United States in *Katz* v. *United States,* decided December 18, 1967, (36 U.S. Law Week 4080), and that Court's decision in *Kolod, Alderisio et al.* v. *United States,* decided January 29, 1968 (36 U.S. Law Week 3302). Our motion for reargument had been made returnable before this Court on September 25, 1967. The granting of the motion (De-

cember 29, 1967) came after all of the decisions just mentioned except *Kolod-Alderisio*. Of those intervening decisions *Kaiser* and *Katz* affect this reargument most acutely —*Kaiser*, because although deciding that *Berger* is not retroactive, it (*Kaiser*) was nevertheless followed within a few weeks by the granting of this reargument; and *Katz* because, coming shortly after *Kaiser* and evidently leaving no further doubt that State telephone wiretapping is subject to the Fourth Amendment, it (*Katz*) too was followed by the granting of this reargument.

In our treatment in this brief of the respective effects of the above mentioned decisions—chiefly *Berger*, *Kaiser* and *Katz*—we shall discuss those effects from the three aspects of the wiretap constitutionality issues which are presented by the record of our case, namely, (1) the Federal (Fourth Amendment) and the State constitutional adequacy of the affidavits to support the instant ex parte wiretap orders, (2) the Federal (Fourth Amendment) and State constitutional adequacy of the ex parte order itself, and (3) the Federal (Fourth Amendment) constitutional adequacy of the statutory (§ 813a) and constitutional (Article I, § 12) provisions of this State permitting ex parte wiretap orders. A fourth question necessarily presented is, of course, the question of retroactivity of *Berger* and *Katz* both as a question generally affecting New York State wiretap orders and prosecutions based on wiretap evidence, and as a question specifically affecting the wiretap issues in this case.

We would respectfully note that this reargument proceeding, in which two of the most fundamental reargument factors connoted within this Court's Rule XX are presented —"supervening and inconsistent decisions of the United States Supreme Court", and "questions of profound public interest"*—presents also the situation which, we take

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* *Cohen and Karger, Powers of the New York Court of Appeals* (Rev. Ed.), p. 697.

it, falls literally within the words of Rule XX, i.e., an overlooking or misapprehending of points owing to insufficiently sharp prior presentation of the points by the parties.* In particular, counsel for appellant Cohen deem that we may not have previously presented to this Court with sufficient sharpness the question of the Federal (Fourth Amendment) and State constitutional adequacy of the ex parte wiretap order itself, as distinct from the affidavits submitted in support of the application for the order and the issues of probable cause and scope and execution of the wiretap- "search" in light of this State's own Constitution and this Court's decisions on search and seizure.

ARGUMENT

POINT I

Introductory to argument: the indicated or possible effects of the *Katz*, *Berger* and *Kolod (Alderisio)* decisions of the United States Supreme Court, and of the *Kaiser* (and *Morhouse* and *Sarisohn*) decisions of this Court, as applied to the present appeal and reargument.

People v. Kaiser

This Court's reasoning in *Kaiser* was essentially, that if *Berger* is to be read as covering State telephone wiretapping, such effect of *Berger* shall operate in this State only prospectively, this rule of prospectivity moreover being formulated by this Court not in terms of post-*Berger* trials or prosecutions (or appeals) involving issues of wiretap evidence, but in terms of post-*Berger* wiretap

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* Cf. *United States Supreme Court Rule 58 (2) (Rehearing)*, referring to "substantial grounds available to petitioner although not previously presented".

orders, i.e., wiretap orders issued prior to the *Berger* decision shall not be deemed affected by that decision.

We read the *Kaiser* decision as at least expressing doubt concerning, or as leaving open, the question of whether *Berger* did affect State telephone wiretapping either decisionally or by enunciation of a controlling principle.

Under a separate heading, *infra*, we treat the question of *Berger's* (and of *Katz's*) retroactivity or prospectivity. Also, under our separate treatment of *Katz*, *infra*, we take up the question of whether, irrespective of the meaning derivable from *Berger* standing alone, the further meaning derivable from *Katz* as supplementing *Berger* requires the conclusion that State telephone wiretapping must comply with the Fourth Amendment. And in our detailed treatment *infra* of this Court's construction of the New York Constitution the *Kaiser* case is further extensively discussed.

People v. Morhouse

People v. Sarisohn

Insofar as relevant to this reargument—and bearing in mind that in this introductory portion of our argument in this brief we are only summarizing the principal recent decisions of this Court and the United States Supreme Court which may affect this case, specific points in those decisions being more fully treated in appropriate connections *infra*—*People* v. *Morhouse*, No. 406-67, held that Morhouse was entitled to a full evidentiary hearing as to certain ex parte orders for room bugging and wiretapping which Morhouse was found to have standing to challenge. However, this Court also held in *Morhouse*, following its *Kaiser* ruling as to non-retroactivity of *Berger*, that in the remand hearing the eavesdropping and the ex parte orders in *Morhouse* should be tested by "standards reasonably believed applicable at the time such orders were obtained and this conduct occurred," not "upon the basis of refinements in criminal procedure only recently formulated by the United

States Supreme Court and not at all related to the 'integrity of the fact-finding process' ". The Court in *Morhouse* also stated that "if the Court orders authorizing these eavesdrops were improperly issued *or executed* even under the law as it was then understood" tainted evidence thereby obtained must result in vacating the conviction. (Emphasis supplied*)

The *Morhouse* decision also dealt with an issue of lack of full disclosure by the prosecution concerning its eavesdropping activities—a similar question is presented in our case since we contend that the police have spoliated important evidence and have refrained from making disclosures which would or might reveal that the wiretap evidence and the illegal search-obtained evidence in our case are so interwoven as to taint the wiretap evidence for that reason alone.

Chief Judge Fuld and Judges Bergan and Christ dissented in *Morhouse* on the last mentioned point (*inter alia*) as to non-disclosure by the People. Chief Judge Fuld also joined in Judge Christ's dissent from the Court's refusal to apply *Berger* retroactively to the *Morhouse* case.

The herein relevant rulings of this Court in *Matter of Sarisohn*, No. 422-67, were that certain telephone wiretap evidence was disapproved for insufficiency in the ex parte affidavits, which were merely of "standard-form" and failed to specify facts on which the Judge exercising discretion could act; that the situation in that respect in *Sarisohn* did not meet the standards of *People* v. *McCall*, 17 N.Y. 2d 152, or of the *Kaiser* case; and that supplementary oral statements under oath by the police officer to the issuing Justices were not curative because they were not recorded and hence did not become part of the record basis of the orders. Chief Judge Fuld, concurring in *Sarisohn*,

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* We have emphasized the words "or executed" in the above quotation because we believe an important issue thereby suggested is presented in this reargument (*infra*).

again stated his position that the *Berger* case had outlawed wiretapping under § 813-a.

Katz v. United States

The Supreme Court of the United States decided the *Katz* case on December 18, 1967; as mentioned, this was subsequent to the *Kaiser, Morhouse* and *Sarisohn* decisions of this Court. *Katz* involved an electronic device attached to the outside of a public telephone booth. No "trespass" and no "physical penetration" of a "constitutionally protected area" was involved. The Court in *Katz* was faced, therefore, with the unqualified question whether electronic eavesdropping is an invasion of Fourth Amendment-protected privacy regardless of the physical manner in which the eavesdropping is done. The decision in *Katz* was that all electronic eavesdropping is subject to the Fourth Amendment—not just "trespassory" etc. activity as was involved on the facts in *Berger*. If there were any doubt that *Katz* of necessity has ended the immunity of State telephone wiretapping to the restrictions of the Fourth Amendment, the doubt is ended when one considers that in addition to the sweeping and unqualified way in which the Court speaks throughout the *Katz* opinion of official electronic search of human conversation as being governed by the Fourth Amendment, the Court has expressly overruled *Olmstead* v. *United States*, 277 U.S. 438; and that in declaring that "the Fourth Amendment protects people, not places", the Court has applied this to the facts of the *Katz* case in language unmistakably denoting Fourth Amendment protection for telephone privacy:—

> "* * * a person in a telephone booth may rely upon the protection of the Fourth Amendment. One who occupies it, shuts the door behind him, and pays the toll that permits him to place a call, is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world. To read the

> Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication."

It was immediately after stating the above in the *Katz* opinion that the Court went on to discuss the *Olmstead* case, *supra*. It will be recalled that the *Olmstead* case has stood since 1928 as the authority commonly invoked by proponents of State telephone wiretapping for the proposition that such State activity is not governed by the Fourth Amendment, *Olmstead* having held that Federal wiretapping was not so governed,* and hence the inference having been drawn *a fortiori* that State wiretapping was not so governed. *Katz* has put an end to *Olmstead*. We quote the pertinent portions of the *Katz* opinion (including the Court's footnotes) (36 U.S. Law Week at 4081):

> "The Government contends, however, that the activities of its agents in this case should not be tested by Fourth Amendment requirements, for the surveillance technique they employed involved no physical penetration of the telephone booth from which the petitioner placed his calls. It is true that the absence of such penetration was at one time thought to foreclose further Fourth Amendment inquiry, *Olmstead* v. *United States*, 277 U.S. 438, 457, 464, 466; *Goldman* v. *United States*, 316 U.S. 129, 134-136, for that Amendment was thought to limit only searches and seizures of tangible property.[18] But '[t]he premise that property interests control the right of the Government to search and seize has been discredited.' *Warden* v. *Hayden*, 387 U.S. 294, 304. Thus, although a closely divided Court supposed in *Olmstead* that surveillance without any trespass and without the

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* Congress' subsequent enactment of Section 605 of the Federal Communications Act (Title 47, U.S.C.) was its response to the *Olmstead* ruling that Federal wiretapping was outside any ban of the Fourth Amendment.

seizure of any material object fell outside the ambit of the Constitution, we have since departed from the narrow view on which that decision rested. Indeed, we have expressly held that the Fourth Amendment governs not only the seizure of tangible items, but extends as well to the recording of oral statements, overheard without any 'technical trespass under . . . local property law.' *Silverman* v. *United States*, 365 U.S. 505, 511. Once this much is acknowledged, and once it is recognized that the Fourth Amendment protects people—and not simply 'areas'—against unreasonable searches and seizures, it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure.

We conclude that the underpinnings of *Olmstead* and *Goldman* have been so eroded by our subsequent decisions that the 'trespass' doctrine there enunciated can no longer be regarded as controlling. The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment. The fact that the electronic device employed to achieve that end did not happen to penetrate the wall of the booth can have no constitutional significance.

[18] See *Olmstead* v. *United States*, 277 U.S. 438, 464-466. We do not deal in this case with the law of detention or arrest under the Fourth Amendment."

From the above quotation it will be seen that the overruling of *Olmstead* by *Katz* is done so unqualifiedly, and with such circumstantial reference to the chain of reasoning in *Olmstead*, as to justify our earlier statement that the pronounced constitutional doom of Fourth-Amendment-free State wiretapping can no longer be doubted.

Continuing our summary of the relevant rulings in the *Katz* case, it is to be noted next that the Court there has in effect approved a judicial warrant procedure for electronic eavesdropping in appropriate circumstances satisfying the tests of the Fourth Amendment. In this respect *Katz* carries forward the concept of such a warrant procedure which first saw specific fruition in *Osborn* v. *United States*, 385 U.S. 323, where the Supreme Court approved a minifon-type surveillance on the basis of an exceptionally careful and discriminate prior judicial permission. *Osborn*, then *Berger*, and now *Katz* have thrown considerable light on what the Supreme Court considers to be an adequate Fourth Amendment judicial warrant procedure for electronic "search and seizure" of human conversation.

Further details as to the standards which the Supreme Court has enunciated for the purposes of such a Fourth Amendment judicial warrant procedure in the field of official electronic eavesdropping are taken up *infra* in other connections. We would mention here that a foremost theme which we shall be asking this Court to take into consideration in deciding this reargument is that, once Fourth Amendment standards of probable cause and the manner of executing the search and the like standards of our own State Constitution are held applicable to electronic eavesdropping including wiretapping, effective analysis of the constitutional adequacy of a particular ex parte court wiretap order is not significantly affected by distinctions of policy as between retroactive or prospective application of a decision like *Berger* or *Katz*.

Concluding this summary of the *Katz* decision, we note that the Court there had words to say also about the problem of retroactivity. This topic needs to be separately treated in this brief, and we do so in Point II, *infra*.

The *Berger* Decision

In our printed motion for reargument herein we quoted and discussed the majority, concurring and dissenting opin-

ions in *Berger* v. *New York*, 388 U.S. 41, 18 L.Ed.2d 1040, from the standpoint of whether that case, in declaring that §813-a on its face violates the Fourth and Fourteenth Amendments, applies to telephone wiretapping and not only to room bugging. In *People* v. *Kaiser*, this Court's decision No. 470-67, which we discuss separately *infra* as to all of its rulings and reasoning relevant to this reargument, we note here that this Court took the view that it is at least doubtful whether *Berger* covers telephone State wiretapping. We proceed in this brief on the assumption that as of the time of this Court's decision in *Kaiser*, the Court was not convinced that the Supreme Court of the United States in *Berger* had either struck down §813-a as applied to State wiretaps, or had (expressly or impliedly) made State telephone wiretapping subject to the Fourth Amendment.

We do not here repeat our analysis of the *Berger* decision as set forth in our printed motion for reargument because the essential object of that analysis—to show that the Supreme Court of the United States now treats or is prepared to treat State telephone wiretapping as being subject to the Fourth Amendment—must now be supersedingly viewed anew in light of *Katz* v. *United States, supra;* we further discuss the *Katz* case below.

Kodol, Alderisio, et al. v. United States

The above entitled decision of the Supreme Court of the United States, rendered January 29, 1968, *per curiam*, No. 133, October Term, 1967, 36 U.S. Law Week 3306, in which certiorari had previously been denied (389 U.S. 834), is the most recent of the decisions which we are treating in this introductory point of our argument. The Court set aside the previous denial of certiorari, granted certiorari, vacated the judgment of the United States Court of Appeals, and remanded to the District Court for further proceedings consistent with the *per curiam* opinion. The facts in *Kodol-*

Alderisio which brought about this result were a new disclosure that unlawful electronic eavesdropping had occurred at Alderisio's place of business; that the Solicitor General contended the eavesdropping had produced nothing which, under standards set up and administered by the Department of Justice itself, "is arguably relevant to the litigation involved"; and that the Supreme Court declined to allow the Department of Justice to be its own judge, unilaterally, of what "is arguably relevant" in evidence obtained by unlawful electronic eavesdropping, but that this must be decided by a Court after a full judicial hearing.

The *Kodol-Alderisio* case has additional importance because the problem of whether or not to apply the *Berger* case (and now the *Katz* case as well) on a retroactive basis can not be solved without taking into account a quite recent practice shortly antedating the *Berger* decision of the Supreme Court known as the "*Schipani* review procedure" of which *Kodol-Alderisio* is the latest example. This "*Schipani* review procedure," fully described in Point II of this brief, *infra*, is a procedure which was initiated in *Schipani* v. *United States*, 385 U.S. 372, 17 L.Ed.2d 428, decided December 12, 1966, whereby the Department of Justice has been systematically disclosing all instances in which Federal criminal prosecutions are or have been dependent on unlawful or questionably lawful electronic eavesdropping in whole or in part, so that the Courts may take appropriate corrective measures for the vacating of convictions or for the holding of evidentiary hearings with a view to such vacating or to dismissal of pending indictments. The *Kodol-Alderisio* ruling handed down by the Supreme Court on January 29, 1968, that the "*Schipani* review procedure" continues very much alive, signifies in the plainest way that the Supreme Court of the United States is far indeed from confining its recent electronic eavesdrop decisions such as *Berger* and *Katz* to a merely prospective operation.

Osborn v. United States

Osborn v. *United States*, 385 U.S. 323, 17 L.Ed. 2d 394, decided December 12, 1966—the same day as *Schipani*, *supra*—and thus antedating *Berger* by some six months, will undoubtedly be regarded by future legal historians as marking, together with the *Schipani* case, the first systematic step by the Supreme Court of the United States in bringing the laws of electronic physics into realistic conformity with the law of the Fourth Amendment.* *Osborn* contains the first intimation, in any case decided by the Supreme Court, that official electronic surveillance claimedly violative of the Fourth Amendment may pass constitutional muster if the officials involved have first obtained appropriate judicial permission in the nature of a "search warrant" issued on probable cause. This warrant procedure for official electronic "searches" has, since *Osborn*, been much more thoroughly worked out by the Supreme Court, in its *Berger* and *Katz* decisions, *supra*. (The entire herein relevant impact of *Osborn* (in relation to *Berger* and *Katz*) is taken up in Point II *infra*.)

* * * * *

By way of completing the chronology of the present record posture of this case as it now comes before this Court on reargument, it is to be noted that, while the Supreme Court denied certiorari (385 U.S. 976, December 5, 1966; reh. den. 385 U.S. 1032, January 16, 1967), of this Court's affirmance of the Appellate Division (18 N.Y. 2d 650), the denial of certiorari was "for want of a final judgment".

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* Preceding *Osborn* and *Schipani* was *Black* v. *United States*, 385 U.S. 26, 17 L.Ed. 2d 26, decided November 7, 1966, which we further treat in Point II, *infra*, in connection with our more complete discussion of the "*Schipani-review* procedure."

POINT II

A. Irrespective of the "retroactivity" problem as applied to this case, the wiretapping at issue here should be invalidated and the wiretap evidence suppressed, because under the pre-*Berger* standards of the law of search and seizure in this State and under Art. I, Sec. 12 of the New York Constitution and §813a of the Code of Criminal Procedure, this wiretapping was unlawful.

B. Notwithstanding this Court's decisions in the recent *Kaiser* and *Morhouse* cases, the Court should now unequivocally rule, that official telephone wiretapping by New York State governmental personnel must comply with the Federal Fourth Amendment, in view of the decision of the United States Supreme Court in the *Katz* case.

C. The Court should also now rule that the *Berger* and *Katz* decisions are applicable in deciding this appeal and reargument.

As the Court will have gathered from our above grouping of points under this heading, we respectfully consider that these several contentions or suggestions may be most helpfully presented in combination with each other. Nevertheless, in the presentation which now follows, we shall try insofar as possible to avoid unnecessary blurring of the lines of argument.

As regards our above subheading "A"—urging that this State's own pre-*Berger* standards of search and seizure as applicable to telephone wiretapping require disapproval of the wiretapping done in the present case—a comparison of the record features of this wiretap with the record features of the wiretaps in the *Kaiser*, *Morhouse* and *Sarisohn* cases in the light of the standards applied by this Court in those cases, is instructive.

The pertinent record facts of the present wiretap were described and discussed at length in appellant Cohen's printed brief in the present appeal, at pp. 13-25, 45-59. The ex parte wiretap application and supporting affidavit appear at R. 23-29. The ex parte wiretap order appears at R. 21. The following features of the instant wiretap situation are relevant to this reargument and should be viewed with an eye to the *Kaiser, Katz* and *Berger* decisions;

(1) The application for the ex parte order consisted of an affidavit by Assistant District Attorney Kenneth J. McCabe and two informants, Alvin G. Rosen and Audrey Saltzman. The application was made on July 28, 1960, the order was granted the same day, and the wiretapping was done from July 29 to September 2, 1960 on Dr. Cohen's office telephone, a period of 36 days. (See R. 21-29, 563).

(2) The McCabe affidavit (R. 23-25) contained all of the allegedly material information, the affidavits of the informers Rosen and Saltzman having been merely conclusory confirmations of Mr. McCabe's affidavit (R. 26-29), and stating that the information given by each of the informers to the police was their own "experience" and from conversation Audrey Saltzman allegedly had with one Irma Wertheimer. The McCabe affidavit averred that it was made upon *information and belief* and upon the annexed affidavits of Rosen and Saltzman, and that the sources of the information and the grounds of the belief were those *"annexed affidavits, the record and files of his office and information supplied to deponent by the detective's squad attached to the office of the District Attorney, Kings County"* (Emphases added).

(3) The terms of the ex parte wiretap *order* itself (R. 21), as distinct from the application or affidavits, authorized tapping "of any and all telephone communications made to and from" Dr. Cohen's office telephone. Thus, the order did not specify or discriminate in any way as to which con-

versations might be "seized", but allowed a blanket "seizure" of any and all conversations on the telephone in Dr. Cohen's office. Nor, did the order refer to any specific alleged abortion as to which seizure of telephone conversation should be authorized and confined; *there is not the slightest intimation in the order or the affidavit that any conversation at all would take place concerning past or presently being committed abortions.* Nor, since (again) there had been no verbal testimony supplementing the application, can the order be construed as having constructively incorporated any limitation or specification derivable from any such verbal testimony.

(4) The scope and manner of *execution* of the actual carrying out of the wiretapping was a continuous performance from July 29 to September 2, 1960. The wiretapping was not only continuous, it was indiscriminate, saturational, literally total, in its dragnet "search and seizure" of incoming and outgoing telephone calls on the appellant physician's office telephone for a period of about five weeks. Some idea of the indiscriminate and total nature of this eavesdropping may be had from the District Attorney's statements, while resisting our demand for the production of the taped conversations, that the taps had "relation to matters completely unrelated to this case" (R. 69), "this investigation went well and beyond just the eight women who are named in these indictments * * * certain information was obtained relevant to other persons but they are persons whose cases will not be before the Court" (R. 75), "the tremendous volume of telephone conversations that took place just over the wire from the doctor's office phone would require approximately six months to transcribe" (R. 77), "there are about forty records. Each one would take two hours to hear" (R. 77). And this prodigious, indiscriminate wiretapping took place, it will be remembered, on a telephone which carried, for the five weeks involved, innumerable confidential professional conversations be-

tween a physician and hundreds of his female patients, only a minute fraction of whom are alleged to have been the subject of "crime"—and those few only after the dragnet had operated for five weeks. In the light of decisions like *Kaiser*, *Osborn* and *Katz* (see further discussion of those cases *infra*) which so meticulously point to utmost selectivity and discreet limitation as necessary to justify electronic "search and seizure" of conversation, the wiretapping in the present case is practically a laboratory example of what this Court and the Supreme Court inferentially condemned in those cases by enunciating the standards of constitutional acceptability illustrated by the fact of those cases.

(5) *The affidavits were the only showing made before the Judge in applying for the wiretap order. No supplemental or confirmatory verbal proof was submitted to the issuing Judge. At least, if there was any such, there was no record made thereof.*

(6) The "information" recited in the McCabe affidavit was that Irma Wertheimer in July or August of 1958 (2 years before the wiretap order was sought) being pregnant, "obtained information" that a criminal abortion could be performed upon her by the within Dr. Cohen; that shortly thereafter she went to Dr. Cohen's office with her husband Milton Wertheimer and had an abortion done for $500; that in July or August of 1959 Irma Wertheimer, being again pregnant, this time from intercourse with her boyfriend Constantine Triges, she and Triges went to Dr. Cohen's office where they paid him $400. for performing an abortion; that again in October or November 1959 Irma and her boyfriend Triges went to Dr. Cohen's office where they paid him $400. for performing another abortion; that during the first week of February 1960 (6 months before the wiretap order was sought) Audrey Saltzman, believing herself pregnant, consulted with her girlfriend Irma Wertheimer regarding Dr. Cohen, Audrey and Alvin G. Rosen went to Dr. Cohen's office, Rosen had $750. with him, Dr.

Cohen examined Audrey and advised she was pregnant, he demanded $900. to perform an abortion, as Rosen only had $750. with him they left his office and Dr. Cohen did not perform an abortion because thereafter they claim, Audrey's menstrual cycle came about naturally and they had no reason to return. *No affidavit was obtained from Irma or Milton Wertheimer, or from Constantine Triges, and the affidavits do not contain one word that the Wertheimer information was verified by anyone.**

(7) The affidavits contain nothing concerning the reliability of Rosen and Saltzman as informers and the Judge who signed the wiretap order had no information from which he could determine their reliability.

(8) The affidavits also show on their face that all of the alleged information concerning Irma Wertheimer was hearsay to Rosen and Saltzman and at least double hearsay to the police and the District Attorney. As for the item in the McCabe affidavit about Rosen's and Saltzman's own alleged visit to Dr. Cohen's office, this would scarcely rank as "reasonable grounds" since all that allegedly occurred was a conversation about an abortion, but no abortion. The police testimony in the suppression hearing before Mr. Justice Rinaldi revealed that the hearsay character of the affidavits was even more attenuated than appeared from the affidavits themselves because the police evidently got their whole story from Rosen rather than from his girlfriend Miss Saltzman, so that all of the alleged police information about Miss Saltzman's friend Irma Wertheimer (from whom no affidavit was obtained) came to them by *triple* hearsay (R. 119-132, 151-162, 241-247). Indeed, since Mr. McCabe in turn got his information from an unspecified police or detective source, or for all that appears, from *a chain* of such sources, the case is one *of at least quadruple* hearsay.

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* As a matter of fact, there is no charge against the Doctor based on the alleged Wertheimer abortions, nor surprisingly the alleged Saltzman incident.

(9) Besides all of this, the alleged happenings mentioned in the McCabe affidavit long antedated the wiretap application which was made at the end of July 1960. The alleged Irma Wertheimer incidents were in the summer of 1958, the summer of 1959 and the fall of 1959, and the inconclusive alleged Saltzman-Rosen incident was six months prior to the wiretap application. Nevertheless, Mr. McCabe's affidavit, which was sworn to July 27, 1960, concluded that by reason of the aforesaid there was "reasonable cause to believe that evidence of the crime of criminal abortion may be obtained if telephone messages were to be intercepted" on Dr. Cohen's office telephone.

(10) Nowhere in the application for the wiretap order was there any claim of exigency or of emergency need to tap Dr. Cohen's office telephone.

(11) Nor did the application define or discriminate or specify in any way what were the particular conversations to be eavesdropped (or "seized").

(12) Nor did the application contain anything whatever to support the contention either that evidence of any alleged past-committed abortion would be found, or that evidence of any current or "present" crime of abortion would be found—all of the allegations having related, as seen, to stale, long past alleged happenings.

We turn now to a closer examination of this Court's decisions in *Kaiser, Morhouse* and *Sarisohn,* against the background of the above enumerated record features of the telephone wiretapping involved in the present case.

In the *Kaiser* decision, we respectfully call attention to the following:—The Court began by describing in detail the criminal conduct of the defendants which necessitated the wiretapping as a matter of literal emergency for the protection of human life against outrageous threats of brutal assault in aid of attempted extortion. The Court then also specifically noted and emphasized that these facts had been

presented to the Judge before whom the application for the wiretap order was made, including sworn verbal testimony—all pointing, moreover, to the then immediate or imminent actuality of the crime as being one which the wiretapping would reveal *in flagrante*, a classic instance of how electronic eavesdropping can be specifically and adequately shown in advance to be aimed at the actual apprehending of a criminal in the "present commission" of the specifically pre-described offense. The Court then went on to note that the wiretap order specifically referred to telephone communications of two of the accused persons over a telephone which demonstratedly had been tracked down as one from which the brutal threats had been made in the immediately preceding period. The Court then noted that the wiretap order was effective commencing July 1, 1964, and that on the evening of July 3 and morning of July 5 the operative conversations were recorded.

The Court in *Kaiser*, after other recitals not here relevant, then mentioned the *Berger* decision and appellant Kaiser's contention that by reason of *Berger* the wiretapping in his case must be suppressed because the underlying statute (§ 813-a) had been declared void on its face in *Berger*. The Court then indicated its doubts that *Berger* applied to wiretapping as distinct from room bugging.

Then the Court in *Kaiser* proceeded to the important point that, "The Constitution and laws of this State, however, place severe restraints on the right of public officials to obtain evidence by wiretapping", the Court quoting Article 1, §12 of the State Constitution, and referring also to §813-a, and §738 of the Penal Law, as having "supplemented the provisions of the Constitution", with particular reference to eavesdropping "without the consent of one of the parties to the conversation".*

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* It will be recalled that none of the wiretapping in our case is claimed by the People to have been done with the consent of any conversing party.

The Court in *Kaiser* then cited and discussed *People* v. *McCall*, 17 N.Y.2d 152, as having held that §813-a requires "the same factual basis to be shown for the issuance of the eavesdropping order 'as in the case of search warrants' "; and that in *McCall*, "relying upon cases in which we held affidavits to be insufficient in ordinary search warrant cases, we held that the wiretap evidence should have been excluded". The Court in *Kaiser* also referred to *People* v. *McDonnell*, 18 N.Y.2d 509, and the *Sarisohn* case, as likewise illustrating, respectively, "the same constitutional standards governing ordinary searches" as applicable to wiretap cases, and that in such cases the Court "strictly adhere[s] to" those standards.

Then, especially significant, the Court in *Kaiser* went on to emphasize, referring to Mr. Justice Brennan's dissenting opinion in the *Lopez* case as to the Fourth Amendment's requirement of "antecedent justification before a Magistrate [as] * * * a precondition of electronic surveillance", that it is "clear" that in this State "no wiretap or bugging order could issue except upon an adequate factual showing, i.e., probable cause to believe that a crime *had been committed* and that the conversations *particularized in the order* would be seized". (Emphasis supplied)

Then in *Kaiser*, referring to the wiretap order in that case and to the above quoted Fourth Amendment requirement of probable cause and particularizing of the conversations to be seized as required by our own State Constitution and §813-a, the Court further stated, "With this requirement as with all the requirements of the statute the order in question complied". And then the Court in *Kaiser* specifically noted that verbal sworn testimony before the issuing Judge "clearly indicates that there was probable cause to believe that a crime *was being committed* and that *the conversations* regarding threats to Mr. Holtzman and his family *would be obtained*". (Emphasis supplied)

The Court in *Kaiser* next noted that while "the order" did not "adequately specify the precise conversations" au-

thorized to be seized, the sworn testimony, which "becomes part of the order," did so specify; also that while the order in *Kaiser* was not "sufficiently limited in time", the actual seizure of conversations "came within a limited period of three days"; also that while "no exigent circumstances were alleged for dispensing with the notice requirement", nevertheless "those circumstances were present here" within the meaning of the Supreme Court's search and seizure decisions.

The Court in *Kaiser* then pointed out that the reason for these "defects" in the *Kaiser* wiretap procedure were that there had been no previous decision setting up those requirements prior to *Berger*. But, we would here note, the Court in *Kaiser* found on the facts, as seen, that in all practical substance the requirements in question had been satisfied. In this latter respect the case is strikingly similar to the *Osborn* decision of the Supreme Court (fully discussed *infra*) and also to the factual situation in the *Katz* decision of the Supreme Court where, however, the eavesdrop had to be constitutionally disapproved because of the lack of any antecedent judicial warrant at all.

The Court in *Kaiser* then set forth its position concerning the retroactivity problem under the *Berger* case—a topic which we discuss separately *infra*.

Let us now note the *Morhouse* decision with a view to similar details affecting the validity of the present wiretapping. The Court held that if an evidentiary hearing should demonstrate that the eavesdrops (including the wiretaps) were based on improperly issued orders or were improperly executed under the pre-*Berger* standards of this State—the Court stating that "§ 813-a is fully applicable to the case at bar", citing *Kaiser*—the wiretaps would have to be suppressed.

The Court in *Morhouse* also specifically stated that it was concerned about the possibility that the wiretapping had

invaded the constitutionally protected confidentiality of attorney and client.

Finally, in *Sarisohn* the Court, as noted in our introductory argument, *supra*, disapproved a wiretap, on the authority of the *Kaiser* and *McCall* cases, by reason of the factual insufficiency of the "standard form" affidavit; and the matter was deemed not cured even by supplementary sworn verbal statements to the issuing Judges because those statements "were not recorded and, hence, did not become 'part of the record basis of the order' ".

We submit that the above described standards enunciated by this Court in the *Kaiser, Morhouse* and *Sarisohn* cases require disapproval of the wiretapping done in our case; and that such a decision in our case does not depend at all on the *Berger* decision, or even on the *Katz* or *Osborn* decisions. *Kaiser*, especially, makes it clear that the law of this State, without need for resort to any of the recent Supreme Court decisions, was violated by the instant wiretapping, in several decisive respects. This State's constitutional and statutory requirements, both as to electronic eavesdropping and as to search and seizure generally, were disregarded by the wiretapping activity in our case. The lack of an adequate factual showing of probable cause, the failure to specify the conversations to be seized, the failure to give even a remote indication that the stale allegations in the affidavits justified belief that permissible evidence of either "past" or "present" crime would be overheard, the poor probative quality of the affidavits, the dragnet way in which the order allowed and the actual wiretapping as done invaded a massive number of irrelevant and professionally confidential (doctor and patient) conversations, the utter lack of any indication of exigency, etc. —all of these incidents of the instant wiretapping are condemned by the *Kaiser-Morhouse-Sarisohn* standards which this Court has authoritatively declared to represent the long established principles of the constitutional law of search and seizure observed in this State.

As regards our above subheadings in this Point II which relate to the effects of the *Katz* case—*Katz* having further evolved the Supreme Court's thinking in *Osborn* and *Berger*—and the new position of the Supreme Court in *Katz* that State telephone wiretapping must comply with the Fourth Amendment, we submit as follows:

We have previously referred, in this brief, to our detailed analysis of the *Berger* opinion as contained in our printed motion for reargument, which we think collects all pertinent items in the *Berger* majority and minority opinions pointing to the inclusion of State telephone wiretapping in the Berger Fourth Amendment rulings as to electronic eavesdropping.

Also, in Point I, *supra*, we have discussed and quoted the pertinent items in the *Katz* decision which, by overruling the *Olmstead* case and by other unmistakable pronouncements, allow of no further doubt that State telephone wiretapping—no differently from any other official electronic search of human conversation—must henceforth comply with the Fourth Amendment.

In the *Kaiser* case this Court reasoned *arguendo* that *Berger* applies to telephone wiretapping, but the Court in *Kaiser* also set forth at length the reasons in support of an opposite view, the Court especially emphasizing that the United States Supreme Court had not yet expressly or unequivocally overruled the *Olmstead* case. We now respectfully ask the Court, in view of the indubitable overruling of *Olmstead* by *Katz*, to put to rest the doubts expressed in *Kaiser* as to whether State wiretapping must comply with the Fourth Amendment.

If this Court should take that step, the next logical step would be (as set forth in our subparagraphs "B" and "C" in the above heading for this Point II), to consider whether the *Berger* and *Katz* decisions (also *Osborn*) are applicable in deciding the present case, and to accord to those

decisions such degree or quantum of "retroactivity" as may be needed and proper on the facts of this case. We are not overlooking for one moment that in *Kaiser* and *Morhouse* this Court has already taken a firm and reasoned position on the question of the retroactivity of *Berger*. But we respectfully urge that the present appeal and reargument merit further consideration of the retroactivity problem.

In the *first* place, *Berger* was followed by *Katz*, *Katz* had not yet been decided at the time of the decisions in *Kaiser* and *Morhouse*, and *Katz* throws important new light on the retroactivity problem. For, in *Katz* the Supreme Court expressly rejected a plea by the Government that "because its agents relied upon the decisions in *Olmstead* and *Goldman*, and because they did no more here than they might have properly done with prior judicial sanction, we should retroactively validate their conduct." To this plea the Supreme Court replied, "That we cannot do", and the Court went on to point out in detail why such retroactive validation was constitutionally impermissible owing to non-compliance with the Fourth Amendment. (See 36 U.S. Law Week 4082-4083.)

Second, this Court's ruling in *Kaiser* (and *Morhouse*) banning retroactive application of *Berger*, adopted as the focal event in administering its ruling, the time of issuance of the particular ex parte wiretap order. We respectfully believe that this Court erred, in any event, in making such the focal event. The only arguably proper focal event for such purposes would be an event in the course of the particular prosecution or litigation involved, not the time of issuance of the ex parte eavesdrop order. None of the decisions of the Supreme Court of the United States which deal with the retroactivity problem in any setting relevant hereto, afford support for making the focal event the time of issuance of a search warrant or like order. All of those decisions (see discussion and citations *infra*) make the focal

event either pendency of an appeal, or date of commencement of a criminal trial, or previous existence of an appeal in which the issue had been preserved. We note that in Judge Christ's dissenting opinion in *Morhouse*, he evidently took it for granted that the focal event turned upon whether "trials are held after the date of the *Berger* decision". We therefore respectfully urge that, in this reargument, the Court should particularly consider whether its selection in *Kaiser* of the focal event as being the time of issuance of the eavesdrop order, raises a point "overlooked or misapprehended" within the meaning of Rule XX. This point, without more, may well prove dispositive of the present appeal and reargument, because our appellant Dr. Cohen has not yet been tried on the indictments in this case. The controlling Supreme Court decisions which have spoken on the retroactivity problem in situations other than those involving electronic eavesdropping, do not appear to support this Court's position on the subject in the *Kaiser* and *Morhouse* cases. In *Linkletter* v. *Walker*, 381 U.S. 618, 14 L. Ed. 2d 601 (1965) the Court held that the *Mapp* rule did not operate retrospectively upon cases finally decided prior to the *Mapp* case. Obviously, that dividing line is far transcended by the line laid down in the *Kaiser* case. See also the *Annotation* in 14 L. Ed. 2d 992. In *Tehan* v. *Shott*, 382 U.S. 406, 15 L. Ed. 2d 453 (1966), the Court made a similar ruling as to its decision in *Griffin* v. *California*, 380 U.S. 609, which had condemned adverse comment by a prosecutor or trial Judge upon a defendant's failure to testify in a State criminal trial; again, this *Tehan* ruling plainly is not authority for this Court's *Kaiser-Morhouse* retroactivity ruling. *In Johnson* v. *New Jersey*, 384 U.S. 719, 16 L. Ed. 2d 882 (1966), the Court ruled that the *Escobedo* and *Miranda* decisions were applicable only to those cases in which trial began after the decisions were announced. The *Johnson* rule, then, if applied to our case, would require giving effect to the *Osborn*, *Berger* and *Katz* decisions, since our case has not yet been tried on the indictments. In *Stovall* v. *Denno*, 388 U.S. 293, 18 L. Ed. 2d 1199 (1967), the

Court held that the "lineup" identification rule of the *Wade* and *Gilbert* cases should apply only prospectively from the date of the decision in *Stovall* v. *Denno* (June 12, 1967). The *Stovall* case is absolutely the highwater mark in the Supreme Court's process of choice favoring prospectivity over retroactivity in particular situations. The *Stovall* case did not involve the Fourth Amendment at all. No decision of the Supreme Court or any other Court involving Fourth Amendment issues, especially those gravest of all Fourth Amendment issues which are involved in electronic spying, has even remotely approached the unqualified prospectivity rule of the *Stovall* case—except, of course, this Court's recent decisions in *Kaiser* and *Morhouse*. In that area of electronic spying the overwhelming indications are to the contrary, as seen; we refer to the Supreme Court's refusal to confer retroactive validation on the Government's conduct in *Katz*, and to the still continuing "*Schipani* review program", which latter we shall now describe more fully.

Third, we mentioned earlier that the continuing "*Schipani* review procedure" is impossible to reconcile with any supposed rule of prospectivity-only in applying the Supreme Court decisions which subject electronic eavesdropping to the Fourth Amendment. In a "Supplemental Memorandum for the United States" filed by the Solicitor General in the Supreme Court in *Black* v. *United States*, No. 1029, October Term 1965, and in another such "Supplemental Memorandum" in *Schipani* v. *United States*, No. 504, October Term 1966, the Solicitor General informed the Supreme Court of the existence of a "policy" or "policies declared by the President on June 30, 1965, for the entire Federal establishment" which "prohibits [unlawful] electronic surveillance * * * (as well as the interception of telephone and other wireless communication) in all instances other than those involving the collection of intelligence affecting the national security." In those memoranda the Solicitor General further informed the Supreme Court that

in a memorandum of November 3, 1966 to all United States Attorneys the Department of Justice had ordered that no case or investigation proceed "which includes evidence illegally obtained or the fruits of that evidence." In the *Schipani* memorandum the Solicitor General further informed the Supreme Court as follows:

> "Recognizing its obligation not to use evidence obtained in violation of a defendant's protected rights in any criminal prosecution, the Department has initiated a program to discover prior instances in which this may have occurred. An extensive review is presently being conducted in order to determine the instances in which there might have been monitoring affecting a case which has been brought to trial * * *. Similarly, a careful review of pending and prospective prosecutions is being conducted by the Department for the purpose of determining what other cases might fall within this category. This will necessarily be a time-consuming process but will be diligently pursued to completion. The Government will promptly notify the appropriate court when any material discovery is made."

We do not have an exhaustive report as to the results of the *Schipani*-review procedure thus far, but in the reported proceedings of the Supreme Court alone (i.e., not including the lower Federal Courts) we know of several instances in which that Departmental review procedure has resulted in the reopening of criminal prosecutions and the vacating of judgments of conviction. E.g., in addition to the *Schipani* case itself, *supra*, see *O'Brian and Parisi* v. *United States*, October Term 1966, No. 823; *Granello and Levine* v. *United States*, October Term 1966, No. 750; *Hoffa* v. *United States*, 387 U.S. 231, 18 L.Ed.2d 738; and the previously cited case of *Kodol-Alderisio*, decided by the Supreme Court on January 29, 1968.

We therefore submit that, in connection with this Court's rulings on the retroactivity problem in *Kaiser* and *Morhouse*, consideration should now be given, in this reargument, to the above described *Schipani*-review items.

Turning now to the substantive standards enunciated in the recent Supreme Court cases, we shall not here burden the Court with a recapitulation of the standards laid down in *Berger* concerning judicial warrants for electronic searches, because this Court set forth and discussed those *Berger* standards in detail in its decision in *Kaiser*. We shall, however, quote the further elucidation of standards given by the Supreme Court in *Katz*—after which we shall describe also the Supreme Court's similar exposition in the *Osborn* case.

The following is quoted from *Katz* v. *United States*, 36 U.S. Law Week p. 4081:

> "The question remaining for decision, then, is whether the search and seizure conducted in this case complied with constitutional standards. In that regard, the Government's position is that its agents acted in an entirely defensible manner: They did not begin their electronic surveillance until investigation of the petitioner's activities had established a strong probability that he was using the telephone in question to transmit gambling information to persons in other States, in violation of federal law. Moreover, the surveillance was limited, both in scope and in duration, to the specific purpose of establishing the contents of the petitioner's unlawful telephonic communications. The agents confined their surveillance to the brief periods during which he used the telephone booth, and they took great care to overhear only the conversations of the petitioner himself.
>
> Accepting this account of the Government's actions as accurate, it is clear that this surveillance was so

narrowly circumscribed that a duly authorized magistrate, properly notified of the need for such investigation, specifically informed of the basis on which it was to proceed, and clearly apprised of the precise intrusion it would entail, could constitutionally have authorized, with appropriate safeguards, the very limited search and seizure that the Government asserts in fact took place. Only last Term we sustained the validity of such an authorization, holding that, under sufficiently 'precise and discriminate circumstances,' a federal court may empower government agents to employ a concealed electronic device 'for the narrow and particularized purpose of ascertaining the truth of the . . . allegations' of a 'detailed factual affidavit alleging the commission of a specific criminal offense.' *Osborn* v. *United States*, 385 U.S. 323, 329-330. Discussing that holding, the Court in *Berger* v. *New York*, 388 U. S. 41, said that 'the order authorizing the use of the electronic device' in *Osborn* 'afforded similar protections to those . . . of conventional warrants authorizing the seizure of tangible evidence.' Through those protections, 'no greater invasion of privacy was permitted than was necessary under the circumstances.' *Id.*, at 57. Here, too, a similar judicial order could have accommodated 'the legitimate needs of law enforcement' by authorizing the carefully limited use of electronic surveillance.

* * * * * *

And bypassing a neutral predetermination of the *scope* of a search leaves individuals secure from Fourth Amendment violations 'only in the discretion of the police.''

We note next the standards laid down in the *Osborn* case (*Osborn* v. *United States*, 385 U.S. 323, 17 L. Ed. 2d 394). It will be recalled that in *Osborn* the Supreme Court dealt

for the first time with an electronic auditing activity where prior judicial permission had been obtained.

For purposes of such comparison (and distinction with our case), the operative facts in *Osborn* were as follows:— On November 7, 1963 a man named Robert Vick had a conversation with Mr. Osborn in the latter's office, Osborn being an attorney for James R. Hoffa in a then pending criminal trial in the Federal Court in Nashville, Tennessee. In this conversation of November 7, 1963, which the parties continued in an adjacent alley outside Osborn's office, Vick and Osborn discussed bribing a prospective juror in the Hoffa trial. Immediately after this November 7 meeting with Osborn, Vick, who unbeknownst to Osborn had been operating as a Federal informer, reported the conversation to an agent of the United States Department of Justice. Vick was then requested to put his report in the form of a written statement under oath, which he did. The next day, November 8, this sworn statement of Vick was shown by Government attorneys to the two Judges of the Federal District Court, Chief Judge Miller and Judge Gray. After considering Vick's affidavit, the Judges agreed to authorize agents of the FBI to conceal a recorder on Vick's person to determine from recordings of further conversations between Vick and Osborn whether Vick's charges were true. When Vick went back to Osborn's office later that same day, November 8, the recording device did not work properly, and Vick made a written statement of what occurred during that meeting. The Government lawyers reported these circumstances to Chief Judge Miller, who then authorized that the recorder be used again on November 11, under stringent instructions (duplicating the original instructions on the first occasion when Judges Miller and Gray had authorized the use of the recorder) that "the tape recorder should be used under proper surveillance, supervision, to see that it was not faked in any way, and to take every precaution to determine that it was used in a fair manner, so that we could get at the bottom of it and determine what the truth was"

(17 L. Ed. 2d at 399, fn. 6). Chief Judge Miller also stated, in explaining why he and Judge Gray had approved the use of the recorder, that, "The affidavit contained information which reflected seriously upon a member of the bar of this court, who had practiced in my court ever since I had been on the bench. I decided that some action had to be taken to determine whether this information was correct or whether it was false. It was the most serious problem that I have had to deal with since I have been on the bench. I could not sweep it under the rug" (17 L. Ed. 2d at 399). Vick then went ahead and obtained the recording of a conversation of November 11, which indubitably inculpated Osborn.

In the *Osborn* decision, where the Justices who had concurred or dissented in *Lopez* v. *United States*, 373 U.S. 427 (except Mr. Justice Douglas who dissented in *Osborn*, and Mr. Justice Goldberg who had meanwhile resigned from this Court) joined, the Court, after describing the facts substantially as we have above set them forth, stated as follows (17 L. Ed. 2d at 399-400) (Court's footnotes omitted):

> "The issue here, therefore, is not the permissibility of 'indiscriminate use of such devices in law enforcement,' but the permissibility of using such a device under the most precise and discriminate circumstances, circumstances which fully met the 'requirement of particularity' which the dissenting opinion in Lopez found necessary.
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> • • • • •
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> So it was that, in response to a detailed factual affidavit alleging the commission of a specific criminal offense directly and immediately affecting the administration of justice in the federal court, the judges of that court jointly authorized the use of a recording device for the narrow and particularized purpose of ascertaining the truth of the affidavit's allegations. As the district judges recognized, it was imperative to determine whether the integrity of their court was

being undermined, and highly undesirable that this determination should hinge on the inconclusive outcome of a testimonial contest between the only two people in the world who knew the truth—one an informer, the other a lawyer of previous good repute. There could hardly be a clearer example of 'the procedure of antecedent justification before a magistrate that is central to the Fourth Amendment' as 'a precondition of lawful electronic surveillance.' "

Thus the Court in *Osborn* was apparently able to obtain a consensus which included some of the divergent Justices in the *Lopez* case.

The circumstances in *Osborn*—bearing no remote resemblance to the circumstances of our case*—included the following:—The situation to which the proposed electronic search was addressed in Osborn was in the highest degree a specific and particularized situation, both as regards the specificity of the criminal charge and the altogether practical feasibility of confining the electronic search to words or conversation which in all likelihood were going to relate exclusively to that specific criminal charge. Everything pointed to the fact that Vick was going to be meeting with Osborn on November 8, and then on November 11, specifically and solely for the purpose of carrying forward the specifically charged criminal project of bribing a juror in the *Hoffa* case. *Osborn* was in no sense, then, a situation in which the proposed electronic search for which advance judicial permission was sought was going to partake of a "general search".

Furthermore, there existed in the *Osborn* case a situation of authentic exigency (as in *Kaiser*), an arguably overriding need—" * * * It was imperative to determine whether the integrity of their Court was being undermined, and highly undesirable that this determination

* But in important respects resembling the situation in this Court's *Kaiser* decision.

should hinge on the inconclusive outcome of a testimonal contest between the only two people in the world who knew the truth—one an informer, the other a lawyer of previously good repute" (17 L.Ed. 2d at 400). This last puts a case for electronic search with advance judicial permission which is a far cry from the justification sought to be made in the present case.

Finally, contrast *Osborn* (and *Kaiser*) with our case as regards the egregiously slack, conclusory and probatively weak and unconvincing "factual showing" made before the "magistrate" in our case on the application for the electronic search "warrant", as contrasted with the meticulous and all but perfectionistically specific showing made to the District Judges in the *Osborn* case.

Concluding this Point II, we submit:—In addition to the unique posture of this case—the denial of certiorari by the Supreme Court only "for want of a final judgment"—as it affects the question of retroactivity versus prospectivity, the pre-*Berger* New York State standards of "search and seizure" in relation to electronic official spying, especially as set forth in the *Kaiser* and *Morhouse* cases, require disapproval of the wiretapping in this case. Of course, if the Court should conclude that by reason of *Katz* the same Supreme Court standards apply *in toto*, there is no doubt that the wiretap evidence herein must be suppressed—even without this Court's applying the *Berger* ruling that §813-a is unconstitutional on its face. In any event, under the *Kaiser-Morhouse* standards, the present wiretap fails of constitutional acceptability for several reasons—insufficient factual showing in the application, i.e., the unreliability of the informers, the attenuation of the hearsay used in the wiretap affidavits, the staleness of the alleged inculpatory information and, in short, the failure of the affidavits to establish "reasonable cause" or "probable cause"; non-exigency; excessive duration; absence of restriction to insure only discriminate eavesdropping within the minimum limits of

necessity; failure to particularize either the conversation to be overheard or the person; dubious need for the eavesdropping in point of the nature of the alleged crime involved, as posing no particular overriding public or private-safety need to resort to electronic spying. The ex parte Court order, and the execution of the permitted wiretapping, were grossly aggrieving under even minimal "search and seizure" tests as to scope and duration of the "search".

POINT III

Appellant Cohen respectfully renews his contentions in the appeal herein as to the mutual or inter-active taint as between the wiretap evidence and the search-obtained evidence; he also respectfully renews his contention as to the over-all circumstances of the conduct of the police which violated his constitutional rights in connection with the wiretap, the search, the spoliation of evidence, and the resort to indecent methods of investigation.

The contentions summarized in the above heading are set forth in detail in Dr. Cohen's brief on appeal in this Court, pp. 60-75.

We respectfully beg leave to renew these contentions upon this reargument, *first* because they ought to be considered integrally with the Fourth Amendment issues as to the wiretap; and *second*, because neither the Appellate Division nor this Court has heretofore rendered any specific opinion treatment concerning those contentions.

CONCLUSION

It is respectfully submitted, that, upon this reargument, the relief prayed for in our "Conclusion" to the appellant's brief in the appeal herein (p. 75) should be granted; and that such further relief should be granted as the Court may deem appropriate in view of the supervening decisions of this Court and of the Supreme Court of the United States.

Respectfully submitted,

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